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Title: Christopher L. Lowe, et al., Petitioners
v.
Securities and Exchange Commission

Docketed:
May 16, 1984

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Schoeman, Michael E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 16 1984	G	Petition for writ of certiorari filed.
2	Jun 22 1984	G	Motion of Financial Publishers of America for leave to file a brief as amicus curiae filed.
3	Jun 25 1984		Brief of respondent SEC in opposition filed.
4	Jun 27 1984		DISTRIBUTED. September 24, 1984
5	Oct 1 1984		Motion of Financial Publishers of America for leave to file a brief as amicus curiae GRANTED.
6	Oct 1 1984		Petition GRANTED.
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7	Nov 15 1984		Brief amicus curiae of Reporters Committee for Freedom of the Press, et al. filed.
8	Nov 15 1984		Brief amicus curiae of AFL-CIO filed.
9	Nov 15 1984		Brief of petitioners Christopher L. Lowe, et al. filed.
10	Nov 15 1984		Joint appendix filed.
11	Nov 15 1984		Brief amicus curiae of Assn. of American Publishers, Inc. filed.
12	Nov 15 1984		Brief amicus curiae of American Civil Liberties Union file
13	Dec 4 1984		SET FOR ARGUMENT. Monday, January 7, 1985. (1st case)
14	Dec 6 1984		CIRCULATED.
15	Dec 13 1984		Record filed.
16	Dec 13 1984		Certified original record & C.A. proceedings received. (Box).
17	Dec 17 1984	X	Brief of respondent SEC filed.
18	Dec 21 1984	X	Brief amicus curiae of North American Securities Administrators Assn. filed.
19	Dec 31 1984	X	Reply brief of petitioners Christopher L. Lowe, et al. filed.
20	Jan 7 1985		ARGUED.

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No. 83-1911

IN THE

Supreme Court of the United States

October Term, 1983

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL E. SCHOEMAN
SCHOEMAN, MARSH, UPDIKE & WELT
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Attorneys for Petitioners

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92 pp

Questions Presented

1. Under the First Amendment, may a court permanently enjoin a publisher from publishing information and opinions about publicly traded securities on the ground that the publisher is not registered under the Investment Advisers Act of 1940?

2. Do the registration provisions of the Investment Advisers Act of 1940, permitting denial or revocation of registration on the ground of prior misconduct, constitute an unconstitutional prior restraint under the First Amendment on the rights of publishers to publish information and opinions about publicly traded securities?

3. Does the exemption in the Investment Advisers Act of 1940 for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" unconstitutionally discriminate under the First Amendment, or under the principles of equal protection of the laws incorporated in the due process clause of the Fifth Amendment, against publishers of non-exempt publications?

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No. ———

IN THE

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CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Christopher L. Lowe, Lowe Publishing Corporation, Lowe Management Corporation and Lowe Stock Chart Service, Inc. respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment and opinion entered in this proceeding on January 18, 1984.

Opinions Below

The opinion of the court of appeals, by Oakes, J., the concurring opinion, by Van Graafeiland, J., and the dissenting opinion, by Brieant, J., have not yet been reported. They are reproduced at A1, A20, and A23, respectively. The opinion of the United States District Court for the Eastern District of New York, by Weinstein, C.J., is reported at 556 F. Supp. 1359. It is reproduced at A41.

References are to pages of the appendix annexed to the petition.

Jurisdiction

The judgment of the court of appeals, reversing the judgment of the district court, was entered on January 18, 1984. A timely petition for rehearing, filed by the respondent herein, was denied by the court of appeals on February 22, 1984.

This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall any person ... be deprived of life, liberty, or property, without due process of law; ..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions

The following sections of the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, are reproduced at A68: section 202(a)(11), 15 U.S..C 80b-2(a)(11) (defining "investment adviser"); section 203(a), 15 U.S.C. 80b-3(a) (requiring registration); section 203(c), 15 U.S.C. 80b-3(c) (specifying the procedure for registration); section 203(e), 15 U.S.C. 80b-3(e) (providing for censure, denial, suspension or revocation of registration); section 203(f), 15 U.S.C. 80b-3(f) (providing for sanctions against associates of investment advisers) and section 209(e), 15 U.S.C. 80b-9(e) (providing for injunctions against violations).

Statement of the Case

Holding Below

The court of appeals held that petitioners should be permanently enjoined from publishing information and opinions about the value of, or advisability of investing in, publicly traded securities, because petitioners are not registered as investment advisers under the Investment Advisers Act of 1940.

Petitioners' Publishing Activity

Petitioners are publishers of investment newsletters. The newsletters primarily contain articles describing various investment markets and market indicators, and economic and political forces affecting those markets. The newsletters also contain factual information and the publishers' opinion about the value and desirability of specific publicly traded securities and other forms of investment.

The newsletters are distributed by mail to subscribers. One newsletter has approximately 5,000 subscribers. Another has approximately 600 subscribers. Distribution has been irregular; one newsletter had two issues in 1981 and five in 1982, and another newsletter had four issues in 1981.

In addition to publishing the newsletters, petitioners maintained a telephone hot line, which consisted solely of tape recorded information similar to the information included in the publications.

Petitioners do not sell or buy, or offer to sell or buy, securities or other investments. They do not have any interest in any of the securities or other investments that they describe or comment on. Petitioners do not render personal advice to individual investors. They do not invest or manage investments on behalf of investors. Petitioners simply publish newsletters.

No allegation is made that any of the investment information published by the petitioners has been false or materially misleading. No allegation is made that the petitioners have profited through ownership of securities referred to in the newsletters.

The Investment Advisers Act

The Investment Advisers Act of 1940 (the "Act"), creates a system of mandatory registration for what it defines as "investment advisers." As applied to newsletter publishers, the Act creates a discretionary system of prior restraint.

By its terms, the Act requires, *inter alia,* registration with the Securities and Exchange Commission (the "Commission") as a pre-condition to publishing, for compensation, information or advice about the value of, or advisability of investing in, securities (15 U.S.C. 80b-2(a)(11) and 80b-3(a)) and authorizes the Commission, in its discretion, to deny or revoke such registration for prior misconduct (15 U.S.C. 80b-3(e)).

On May 11, 1981, the Commission, in the exercise of its discretion, revoked the prior registration as an investment adviser of Lowe Management Corporation and ordered that Christopher Lowe be barred from association with any investment adviser. The Commission based its action on petitioner Christopher Lowe's prior misconduct. Specifically, Christopher Lowe was convicted in 1977 and 1978 of two felony and two misdemeanor counts. None of these convictions arose out of petitioners' publishing activities and none was related to the information or opinions expressed in the newsletters.

The Proceedings Below

When the petitioners continued their publishing (but no other supposed investment advisory activity), the Commission, on June 6, 1982, filed a complaint against them in

the United States District Court for the Eastern District of New York. The complaint sought to enjoin petitioners from continuing to publish their newsletters and to require them to "disgorge" all monies or proceeds received in connection with their publishing business since May 11, 1981, the date of the Commission's order.

The complaint asserted that petitioners were publishing their newsletters without being registered, in violation of Section 203(a) of the Act, 15 U.S.C. 80b-3(a) (reproduced at A69).

The complaint did not assert that any of the information reported or opinions expressed in petitioners' publications was fraudulent or misleading.

The petitioners' answer, among other things, asserted that the Act was unconstitutionally discriminatory, that it violated petitioners' First Amendment rights of free speech and free press, and that it was facially unconstitutional under the First Amendment.

After a one-day trial before Chief Judge Jack B. Weinstein on September 13, 1982, the district court dismissed the portions of the complaint seeking to enjoin petitioners' publishing activities or seeking "disgorgement."

The district court held that the petitioners' publications constituted pure First Amendment speech. Accordingly, the court held that petitioners' publishing activity could not be subjected to the prior restraint of a registration requirement under which the government had discretion to deny or revoke registration based on past misconduct.

The court further held that even if the publications were assumed to be "commercial speech," the sanction of future prohibition against publication was excessive and would be invalid under the First Amendment. Rather than declare the Act unconstitutional, the court construed the Act so as to delete the Commission's discretion to deny or revoke registration of publishers, except in very limited circumstances.

The court did, however, enjoin petitioners from giving information to subscribers or potential subscribers directly or indirectly by telephone, individual letter or in person. It also denied petitioners' post-judgment motion to permit them to provide a telephone service consisting solely of recorded information without any personal communication.*

The Commission appealed to the Court of Appeals for the Second Circuit from the denial of the relief it had requested. Petitioners appealed from the injunctive portion of the judgment and from the denial of their post-judgment motion.

The court of appeals, in a 2-1 decision, reversed the judgment of the district court. The court of appeals held that petitioners should be prohibited from ". . . selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." (A20). It analogized the Act's licensing require-

* The district court also dismissed additional counts alleging that petitioners violated the antifraud provisions of the Act by failing to disclose Christopher Lowe's convictions to their readers, as well as a count alleging that Christopher Lowe was violating the Commission's order. The court of appeals did not discuss these additional counts.

ments, as applied to publishers, to the licensing of professionals. (A18). Alternatively, it held that petitioners' publications were "potentially deceptive commercial speech" (because of Christopher Lowe's prior criminal record). (A19). The court said, however, that Christopher Lowe would not be prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor or writer. (A20).

The dissenting judge would have affirmed the district court's judgment. The dissenting opinion said that publications such as the petitioners' enjoy full First Amendment protection at least so far as prior restraint is concerned and that they do not constitute commercial speech. (A24, 29). The dissenting judge noted the heavy presumption against the constitutional validity of prior restraints (A31) and said that ". . . the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers." (A34).

Reasons for Granting the Writ

The court of appeals decision dangerously infringes on freedom of the press. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 559 (1976). Absent compelling circumstances, publishers may not be subjected to a permanent court injunction against future publication. *E.g., New York Times* v. *United States,* 403 U.S. 713 (1971).

The court of appeals, however, imposed a permanent injunction against future publication of truthful information and opinion, notwithstanding the absence of any compelling circumstances, or any clear and present danger, requiring permanent suppression.

Moreover, the court of appeals' upholding of the Act conflicts with numerous cases holding that where the state undertakes to license the exercise of First Amendment rights, it may not deny or revoke a license on the basis of past misconduct, *e.g., Entertainment Concepts, Inc.* v. *Maciejewski,* 631 F.2d 497 (7th Cir. 1980), *cert. den.,* 450 U.S. 919 (1981); *see also, Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980) (collecting 23 additional cases). Denying or revoking such a license based on past misconduct results in the complete suppression of material even though such material may be constitutionally protected.

The court of appeals' rationale, that the Act's regulatory scheme as applied to publishers is similar to the mere licensing of professionals, blatantly violates the First Amendment rights of publishers. Congress may not dictate which subjects people may or may not write about. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 784-85 (1978) held that:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

As stated in *Thornhill* v. *Alabama,* 310 U.S. 88, 101 (1940):

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public

concern without previous restraint or fear of subsequent punishment.

This Court's recent decision in *Bose Corp.* v. *Consumers Union,* —— U.S. ——, 52 U.S.L.W. 4513 (1984), indicates that the publication of information and opinions about products offered to the public by others is protected by the First Amendment. In terms of the First Amendment, petitioners' comments about the advisability of buying IBM stock or Chrysler stock are no different from, *e.g., Consumer Reports'* comments about the advisability of buying IBM computers or *Motor Trend*'s comments about the advisability of buying Chrysler cars. All such publications form part of the free flow of information that is indispensable to our free society and all are constitutionally protected against prior restraint.

The court of appeals' alternative ground of decision, that petitioners' publications may be regulated as commercial speech, erroneously extends the commercial speech doctrine to cover pure First Amendment speech. It conflicts with cases of this Court that define commercial speech as "expression related solely to the economic interests of the speaker and its audience," *e.g., Central Hudson Gas* v. *Public Service Commission,* 447 U.S. 557, 561 (1980).

Petitioners' publications are not related solely to such interests and are not commercial speech. Petitioners have no direct or indirect economic interest in the securities they discuss or in whether the reader buys, sells or does nothing. Petitioners' expression relates to the economic interests not of themselves and their readers, but to the economic interests of their readers and third parties buying and selling securities. Nor are petitioners' publications "speech which does no more than propose a commercial transaction." *Virginia State Board* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 762 (1976). Petitioners publish a wide range of financial and market information. Where they do refer to specific securities, they do not propose securities transactions but rather they comment (favorably or unfavorably) on securities that may be proposed for purchase or sale *by others.*

Even if petitioners' publications are classified as commercial speech, the court of appeals failed to follow the analysis required by *Central Hudson.* It failed to show that petitioners' publications are likely to be deceptive. (The Commission has not alleged that any investment information in the publications is deceptive.) And the court failed to show that *complete suppression* of petitioners' speech is no more extensive than necessary to further the state's interest.

Moreover, the court of appeals' upholding of the statutory exclusion for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation," section 202(a)(11)D, 15 U.S.C. 80b-2(a)(11)(D), violates the principle that freedom of the press under the First Amendment is guaranteed to all publications, *cf., Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue,* —— U.S. ——, 51 U.S.L.W. 4315 (1983). As noted in *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938): "The liberty of the press is not confined to newspapers and periodicals."

Under the principles of equal protection, which are incorporated in the due process clause of the Fifth Amendment, *e.g., Davis* v. *Passman*, 442 U.S. 228 (1979),

> [w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

Zablocki v. *Redhail*, 434 U.S. 374, 388 (1978). Nevertheless, the court of appeals upheld the Act's discriminatory classification of non-exempt publications without any showing of sufficiently important state interests or that the classification is closely tailored to effectuate only those interests.

In summary, this Court should review the decision below because the injunction it imposes, and the statutory scheme it validates, dangerously conflict with the First Amendment right of all publishers to publish on any subject of legitimate public interest, free of judicial or legislative prior restraint.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Michael E. Schoeman
Schoeman, Marsh, Updike & Welt
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Attorneys for Petitioners

May 15, 1984

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 106, 173—August Term, 1983

(Argued September 19, 1983 Decided January 18, 1984)

Docket Nos. 83-6108, 83-6116

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant-Cross-Appellee,

—v.—

CHRISTOPHER L. LOWE et al.,

Defendants-Appellees-Cross-Appellants.

Before:

OAKES and VAN GRAAFEILAND, *Circuit Judges*,
and BRIEANT, *District Judge.**

Investment adviser whose registration under the Investment Advisers Act of 1940 had been revoked for criminal

* Of the Southern District of New York, sitting by designation.

misconduct held not entitled to continue publishing investment advisory newsletters despite First Amendment. Judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Chief Judge*, reversed.

JACOB H. STILLMAN, Associate General Counsel, Securities and Exchange Commission, Washington, DC (Daniel L. Goelzer, Alan Rosenblat, David Sirignano, W. Robert Gray, of counsel), *for Appellant-Cross-Appellee*.

MICHAEL E. SCHOEMAN, Schoeman, Marsh, Updike & Welt, New York, NY (Elizabeth H. Cooper, David A. Newberg, of counsel), *for Appellee-Cross-Appellant Lowe*.

OAKES, *Circuit Judge*:

An investment adviser registered under the Investment Adivsers Act of 1940 was convicted on three different occasions of serious misconduct in connection with his investment advisory business. Pursuant to the Act, the Securities and Exchange Commission revoked his registration because of his convictions. He has nevertheless continuted to publish and sell newsletters containing investment advice, in violation of the Act's requirement of registration. The interesting, if not altogether unique, question presented by this case is whether the publication

of such advice is protected by the First Amendment so as to preclude the SEC from seeking to enjoin its continuance.

FACTS

Christopher L. Lowe is the president of the three corporate entities involved in this case: Lowe Management Corp., Lowe Publishing Corp., and Lowe Stock Chart Service, Inc. Between March, 1974, and May, 1981, Lowe Management was registered with the SEC as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act, 15 U.S.C. § 80b-3(c) (1976). As such it published investment advice and managed and had custody of the funds of its clients on a discretionary basis.

In 1977, Lowe was convicted of two New York misdemeanors relating to his investment advisory business.[1] He pleaded guilty to making false representations to a client that $2,200 had been invested for his benefit and a 27% return earned, when in fact Lowe had misappropriated the funds for his own use. He also pleaded guilty to failing to register in New York State as an investment adviser.

In 1978 Lowe was convicted of two New York felonies.[2] He pleaded guilty to tampering with physical evidence, involving the alteration of a copy of a $10 money order to have it appear to be for the amount of $10,000. In addition, he pleaded guilty to third degree larceny for fraudulently drawing checks on an account to which

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1 N.Y. Gen. Bus. Law § 352-c (McKinney 1968); N.Y. Gen. Bus. Law § 359-eee (McKinney 1968).

2 N.Y. Penal Law § 215.40 (McKinney 1975); N.Y. Penal Law § 155.30 (McKinney 1975).

worthless checks had been deposited. For these convictions Lowe received a prison sentence and was ordered to make restitution to the client.

As a result of these convictions the SEC instituted administrative proceedings under Section 203 of the Investment Advisers Act, 15 U.S.C. § 80b-3(e) & (f) (1976), against Lowe and Lowe Management. The Commission found that Lowe had aided and abetted willful violations of the antifraud provisions of the Act, violated the reporting provisions of the Act, and failed to amend Lowe Management's investment advisory registration form to report the convictions which related to his conduct as an investment adviser. In assessing sanctions the Commission found that Lowe's conduct "could hardly be more serious[,] . . . reflect[ing] a callous disregard" for the high fiduciary standards required of an investment adviser, and that the criminal conduct "clearly demonstrate[d] his total lack of fitness to remain in 'an occupation which can cause havoc unless engaged in by those with appropriate background standards.'" *In re Lowe Management Corp.*, SEC Investment Advisers Act of 1940 Release No. 759 (May 11, 1981) (quoting *Marketlines, Inc. v. SEC*, 384 F.2d 264, 267 (2d Cir. 1967), *cert. denied*, 397 U.S. 947 (1968)). The Commission rejected the argument that sanctions were unnecessary because Lowe and his advisory corporation no longer handled clients' funds or securities, but only provided investment advice by publication. Noting that even these activities "afford numerous 'opportunities for dishonesty and self-dealing,'" *id.* at 5, the Commission revoked the registration of Lowe Management as an investment adviser and barred Lowe from association with any investment adviser. Lowe did not seek judicial review of the Commission's order.

Lowe's criminal activities did not end here, however. In 1982 he pleaded guilty to two charges under New Jersey law of theft by deception in the third degree,[3] for fraudulently misrepresenting that checks drawn on his personal and one of Lowe Publishing's accounts were good and negotiable. For these activities he was sentenced to a three-year prison term and probation, and ordered to make restitution of over $27,000 to the defrauded banks.

Despite the Commission's order of May 11, 1981, revoking Lowe's registration as an investment adviser and barring him from association with any investment adviser, Lowe has published and distributed two investment advisory services, the *Lowe Investment and Financial Letter* and the *Lowe Stock Advisory*, and solicited subscriptions for a third one, the *Lowe Stock Chart Service*. He is president, research chairman, and editor of all three services, and his corporations, Lowe Management, Lowe Publishing, and Lowe Service were the publishers of the newsletters. In addition, Lowe has offered a recorded telephone "hot-line" service to subscribers of six months or more. Despite these activities, he has not applied to register either himself or any of the corporations as an investment adviser.

The *Lowe Letter* has had from 3,000 to 19,000 clients, with an average of about 5,000. Subscriptions cost $39 for one year or $79 for three years. A typical *Lowe Investment and Financial Letter* gives a short-term and long-term forecast. It offers advice on the relative desirability of investing in, among other things, stocks, Treasury bills, and money market funds, and describes rather generally the state of the market. It recommends particular stocks and groups of stocks for purchase or

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3 N.J. Stat. Ann. § 2C:20-4 (West 1982).

sale, discusses precious metals, and announces special reports and the telephone hot-line service.

The *Lowe Stock Advisory* has only a few hundred subscribers and a number of readers who receive complimentary subscriptions. Subscriptions cost the same as do those to the *Lowe Investment and Financial Letter.* The *Stock Advisory* is typically somewhat more specific, however, with a brief introductory examination of general market trends followed by specific purchase, sale, and hold recommendations, particularly for low-priced stocks. The *Lowe Stock Chart Service* has solicited subscriptions, but has never been published.

No contention is made that any of the information published in the advisory services has been false or materially misleading. Nor is it alleged that Lowe himself, unlike the investment adviser in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), has profited through personal or corporate investments from the investment advice rendered.

THE DECISION OF THE DISTRICT COURT

The United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, believed that the Investment Advisers Act could not be construed to permit the SEC to revoke Lowe's registration as an investment adviser, and thus to bar him from publishing his newsletters, without violating the First Amendment. The court first analyzed the case on the assumption that the Lowe publications constituted commercial speech and thus were not entitled to the full protection of the First Amendment. *See In re R.M.J.*, 455 U.S. 191, 200-01 (1982) (advertising by lawyers). It found, nevertheless, that "the censorship that the SEC

would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public," and amounted to an unconstitutional prior restraint on the basis of "speculative assessments." In reaching this conclusion the court apparently thought that the fact of Lowe's past misconduct was not in itself enough to make his future speech "potentially misleading" and consequently subject to restraint. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980).

The court went on to suggest, however, that the case actually fell "outside the rubric of commercial speech." Although recognizing that the Supreme Court had never explicitly so held, Judge Weinstein stated that commercial speech consisted only of advertising, citing *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1140 (3d Cir.) (citing *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973)), *cert. denied*, 456 U.S. 975 (1982). As a result, he believed that Lowe's newsletters were fully protected by the First Amendment, and that their "combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters . . . raises unanswered questions concerning the conditions, if any, under which an absolute restraint may constitutionally be imposed upon them.

Rather than rule the Act unconstitutional, however, the district court construed the Act's definition of an "investment adviser" so as to avoid possible infringement on freedom of the press. It did so by distinguishing personal or "person-to-person" advice from "impersonal" investment advice given in publications. The court evidently reasoned that "strong sanctions in the way of prior restraints" may be invoked against persons providing

"personal" investment advice since that activity involves "delegations of trust and responsibility," but may not be invoked when the investment advice is provided by publication or writing. Accordingly, the court entered a limited injunction enjoining defendants from rendering personal investment advice "by telepone, individual letter or in person." As to "impersonal" advice, the court believed that disclosure, rather than denial or revocation of registration, was the only constitutionally permissible means of protecting the public.

In effect the court construed the Act so as to deny the SEC the authority to revoke a publisher's registration solely on the basis of past misconduct. Under this interpretation, a person whose registration is otherwise revoked may nevertheless remain registered as an investment adviser for the limited purpose of publishing so long as the publication is done "impersonally." A letter to several people rather than to an individual is thus differentiated. Somewhat inconsistently, perhaps, the district court treated Lowe's recorded hot-line telephone message as rendering "personal" rather than "impersonal" advice.

DISCUSSION

We do not believe that the Investment Advisers Act may be rewritten as the district court would rewrite it. The Act does not distinguish between "personal" and "impersonal" advice, but rather between publications or writings "as to the value of securities or as to the advisability of investing in, purchasing, or selling securities," on the one hand, and "bona fide newspaper[s], news magazine[s], or business or financial publication[s] of general and regular circulation," on the other. 15 U.S.C. § 80b-2(a)(11) (1976). The SEC quite properly

determined that the Lowe advisory letters and services were the former, and that Lowe and his corporations were "engag[ing] in the business of advising others, either directly or through [such] publications or writings . . . ." *Id.*

The statute specifically grants the SEC the power to revoke the registration of any investment adviser convicted of certain crimes, among these the crimes for which Lowe was convicted. 15 U.S.C. § 80b-3(e)(2). Accordingly, we believe that the SEC was well within its statutory authority when it revoked Lowe's registration. Unlike the district court, we do not believe that this statutory authority violates the First Amendment.

The Act

The Investment Advisers Act of 1940 was "the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the Depression of the 1930's." *SEC v. Capital Gains Bureau*, 375 U.S. 180, 186 (1963). The Act was the result of a study undertaken by the SEC at the direction of Congress to investigate "the functions and activities of investment trusts and investment companies . . . ." Section 30 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z-4 (1976). The SEC submitted to Congress a memorandum questioning "the good faith of some of the less reputable of these generalized investment services." Hearings on S. 3580 Before a Subcommittee of a Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 47 (1940) at 1008. It emphasized the potential for abuse if persons in the business of publishing investment advice were willing to "lend[] themselves to the use of stock market promoters and manipulators." *Id.* (quoting

Twentieth Century Fund, Inc., The Security Markets 692 (1935)).

On the basis of the SEC's report and other information before it, Congress found that investment advisers were "of national concern" and that "their advice, counsel, *publications, writings, analyses, and reports* . . . occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy." Section 201 of the Investment Advisers Act, 15 U.S.C. § 80b-1 (emphasis added). In so finding, Congress hearkened back to Section 17(b) of the Securities Act of 1933, in which it prohibited the publication of any letter or investment service which describes a security without disclosing that the publisher has been compensated for such publicity, and to concerns expressed in the Senate Report accompanying the passage of the Securities Exchange Act of 1934. 15 U.S.C. § 77q(b) (1976) and S. Rep. No. 792, 73d Cong., 2d Sess. 8 (1934).

The Investment Advisers Act makes it unlawful for an unregistered investment adviser to make use of the mails or any means of interstate commerce in connection with his or its business as an investment adviser. 15 U.S.C. § 80b-3(a). The Act defines "investment adviser" broadly to include

> any person who, for compensation, engages in the business of advising others, either directly *or through publications or writings*, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or *promulgates* analyses or reports containing securities . . . .

15 U.S.C. § 80b-2(a)(11) (emphasis added). The section exempts from the definition of an investment adviser "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation . . . ." *Id.* Section 203 provides for registration of investment advisers and gives the SEC powers of censure, denial, or suspension of registration. 15 U.S.C. § 80b-3(e). The SEC can censure an investment adviser, or suspend or revoke his registration if the adviser or any person associated with him has been convicted within ten years of certain felonies or misdemeanors.[4] The SEC invoked this statutory scheme to revoke the registration of Lowe Management and bar Christopher Lowe from publishing investment advice or associating with an investment adviser.

The Act's Application to the Lowe Newsletters

The first step in our analysis of this case is determining whether Lowe's newsletters are within the statutory definition of investment adviser and thus subject to the registration requirement, or whether they are "bona fide newspapers" and thus exempt from the requirement. The

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[4] The Commission may invoke the censure, suspension, and revocation provisions if it finds that such conviction

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense.

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

15 U.S.C. § 80b-3(e)(2).

leading case construing the exclusion for bona fide newspapers is this circuit's *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970). The *Wall Street Transcript* was a weekly tabloid which sold for $5 an issue or $180 per year. The *Transcript* consisted primarily of reports on specific securities, each of which was identified with the name and address of a broker/dealer firm. It also printed some management speeches, miscellaneous personnel announcements, editorials, and advertisements. This court held that the *Transcript* was not per se a "bona fide newspaper" or "financial publication of general and regular circulation" so as to be excluded from the definition of investment adviser. It stated that "[t]he phrase 'bona fide' newspaper . . . means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred." 422 F.2d at 1377. Rather than looking to the purely formal "indicia" of a newspaper, the court examined the substance and content of the publication and found that "[m]ost of its published material consists of reprinted reports assessing various securities issues." 422 F.2d at 1378. It held that "[t]his characteristic emphasis on particular issues and companies at the very least raises doubt about whether the *Transcript* is outside the exclusion—a suspicion which we believe that the S.E.C. should be allowed to investigate." *Id.*

The *Wall Street Transcript* presented a much closer case for exclusion under the Act than does the *Lowe Investment and Financial Letter* or the *Lowe Stock Advisory.* Lowe's newsletters quite clearly are "engage[d] in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchas-

ing, or selling securities . . . ." 15 U.S.C. § 80b-2(11). Under the test of *Wall Street Transcript*, it is equally clear that Lowe's publications are not engaged primarily in "customary newspaper activities," but rather in the activities that the Investment Adviser Act is intended to regulate. Thus, we hold that the SEC properly determined the registration requirements of the Act to be applicable to Lowe's newsletters.

First Amendment Concerns

Wall Street Transcript held that the Investment Advisers Act does not on its face abridge freedom of the press. In reaching this conclusion, the court stated that

> it is not necessary to enlarge the category of "bona fide" newspapers into an exclusion for all publications which could conceivably be brought within the term "typical newspaper" in order to avoid the "seeds of a constitutional controversy" which the appellee argues would result from an attempt to regulate the conduct of any newspaper publisher.

422 F.2d at 1378-79. Nor did the court believe that it had "to base a construction of the Act on the assumption that the activities involved in giving commercial investment advice are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression." *Id.* at 1379. Instead, the court reasoned that it need only delineate "a boundary between the special type of 'merchandising' activities which must lead to registration and the publication of expression which lies beyond the Act's regulatory purposes." *Id.* In reaching this conclusion, the court cited comments by Justice Harlan in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *See* 422 F.2d at 1379. In that case, Justice Harlan said:

> A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws . . . ." Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not "unconditional." (Citations and footnotes omitted).

388 U.S. 130, 150 (1967). Accordingly, the court held that the registration provisions of the Investment Advisers Act did not violate the First Amendment. 422 F.2d at 1379-80.

The appellees argue that *Wall Street Transcript* is inapplicable to this case because it was decided prior to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In *Virginia Pharmacy*, the Court invalidated a Virginia statute prohibiting pharmacists from advertising their prices, pointing out that the right to distribute and receive information affecting decisions to buy and sell must be protected in a free society. "[T]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765. *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980) (rejecting "the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech"), and *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (advertising by attorneys not subject to "blanket suppression," though false, deceptive, or misleading advertising may be suppressed).

We believe that *Wall Street Transcript* still states good law. Indeed, the Supreme Court has affirmed its essential

rationale since its decision in *Virginia Pharmacy.* In *Ohralik v. Ohio State Bar Association*, for example, the Court stated that government "does not lose its power to regulate *commercial activity* deemed harmful to the public whenever speech is a component of that activity." 436 U.S. 447, 456 (1978) (emphasis added). The Court noted

> [n]umerous examples . . . of communication that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Id. It concluded that "[n]either *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation." *Id. See also NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409 (1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); and Note, *Peaceful Labor Picketing and the First Amendment*, 82 Colum. L. Rev. 1469, 1484-88 (1982). Thus, considered in light of *Virginia Pharmacy* and its progeny, we believe that the provisions of the Investment Advisers Act at issue here are precisely the kind of regulation of commercial activity permissible under the First Amendment. Accordingly, we believe that the holding of *Wall Street Transcript* controls this case.[5]

[5] This view necessarily leads us to reject the appellees' contention that the Act violates equal protection by subjecting investment newsletters,

We find additional support for our conclusion in the Seventh Circuit's decision in *Savage v. Commodity Futures Trading Commission*, 548 F.2d 192 (7th Cir. 1977) (opinion by Moore, J., of the Second Circuit, sitting by designation). Decided after *Virginia Pharmacy, Savage* nevertheless hewed to the *Curtis Publishing Co./Wall Street Transcript* viewpoint that a business is not immune from regulation merely because it is an agency of the press. *Id.* at 197. On facts closely analogous to those presented by this case, the court held that the publisher of the *Commodity Exchange Bulletin*, a newsletter containing views on the commodity market, was not entitled to registration under the Commodity Futures Trading Commission Act as a commodity trading adviser in view of his previous convictions for securities fraud and mail fraud arising out of the operations of a securities company.

The appellees would distinguish *Savage* on the basis that there the publisher erroneously argued that his commodities newsletter had only the limited protection of commercial speech. They contend that *Savage* was decided before the Supreme Court "clearly indicated" in *Central Hudson Gas* that commercial speech refers only to commercial advertising. They argue that under *Central Hudson Gas* "commercial speech" includes only direct product or service advertising and a seller's indirect or informational advertising. Since Lowe and his companies "do not sell investments [but] report and comment on the investments offered by others," the argument runs, newsletters are not commercial speech.

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but not bona fide newsletters, to regulation. In holding that the publication of investment advice is regulable commercial activity, we necessarily hold also that such newsletters may be treated differently from other publications. This court previously reached the same conclusion in *Wall Street Transcript*, 422 F.2d at 1378-79.

In our view, this argument is unconvincing. Unlike the Third Circuit in *Ad World, Inc. v. Township of Doylestown*, 627 F.2d 1136 (3rd Cir.), *cert. denied*, 456 U.S. 975 (1982), and the court below, we do not believe that the Supreme Court has limited commercial speech solely to product or service advertising. In *Bates v. State Bar of Arizona*, the Court said that "[i]f commercial speech is to be distinguished, 'it must be distinguished by its content,' " not its form, 433 U.S. 350, 363 (1977) (quoting *Virginia Pharmacy*, 425 U.S. at 761)). Although *Central Hudson Gas* stated that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising," 447 U.S. at 563, the Court did not define commercial speech in these terms. Rather it defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. Similarly, in *Friedman v. Rogers*, the Court stated "[b]y definition, commercial speech is linked inextricably to commercial activity . . . ." 440 U.S. 1, 10 n.9 (1979). *Cf. Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 n.14 (U.S. June 24, 1983) (expressing "no opinion as to whether reference to any particular product or service is a necessary element of commercial speech"). These definitions do not limit commercial speech to advertising and are broad enough to encompass Lowe's publications. Thus, although we think it preferable to analyze this case as one involving the permissible regulation of economic activity, we believe that the Investment Advisers Act withstands constitutional scrutiny under First Amendment doctrine relating to commercial speech as well.[6]

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[6] Recent Supreme Court decisions suggest that a similar "middle level" protection is appropriate for certain kinds of speech, for example, in cases of regulation of commercial advertising (*Virginia*

Lowe and his companies argue that in view of the fact that the Commission has never challenged any of the substantive material contained in any of their publications, it may not "rely on the mere possibility of future deception as a ground for the outright prohibition of the publications even under a commercial speech analysis." In essence, they charge the SEC with impermissible prior restraint. Whether we approach this case emphasizing its aspect of the regulation of a profession or view its principal thrust as pertaining to commercial speech, this argument is unavailing.

Before the SEC may revoke an adviser's registration, the Investment Advisers Act requires a finding of misconduct reflecting adversely on the honesty of the adviser, an essential attribute of a person entrusted to deal with intangible products which have numerous, intricate facets as securities do. *See* 15 U.S.C. § 80b-3(e)(2). The appellees rely on such cases as *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979), in arguing that a finding of past misconduct may not serve as the basis for revoking an investment adviser's license. But the regulation of advisory publishers is properly compared, we believe, not to the licensing of theater operators, but rather to the licensing of professionals. *See, e.g., Ohralik v. Ohio State Bar Association*, 436 U.S. at 460; *Watson v. Maryland*, 218 U.S. 173, 177-78 (1910); *Dent v. West Virginia*, 129 U.S. 114, 121-23 (1889). The denial of a professional license for criminal conduct has been a

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Pharmacy, 425 U.S. 748 (1976)); zoning of theaters which play "adult," but not obscene, films (*Young v. American Mini Theatres*, 427 U.S. 50 (1976); labor picketing regulation (*NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980)); and the regulation of professions (*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1977)). Thus, whether we view this case as one involving commercial speech or the regulation of the professions, the Investment Advisers Act does not conflict with the First Amendment.

traditional, and perhaps necessary, aspect of this type of regulation. *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954); *Doe v. Webster*, 606 F.2d 1226, 1239 n.51 (D.C. Cir. 1979). Thus, we believe that the SEC may bar Lowe from the profession of investment adviser because of his past criminal conduct.

That commercial speech is involved leads to no different result. In *Friedman v. Rogers*, the Supreme Court found it irrelevant that the use of a trade name was "not in fact misleading" since it was a type of speech which "enhances the opportunity for misleading practices." 440 U.S. at 15. As this court noted in *Jay Norris, Inc. v. FTC*, "[t]he prohibition in *Friedman* was a total ban on a business practice or form of advertising because of the *potential* for deception . . . ." 598 F.2d at 1252 (emphasis added). Just as the potential for deception may justify the regulation of a profession, *see, e.g., Ohralik*, 436 U.S. at 461-62, so, too, the potential for deception permits government to ban potentially deceptive commercial speech. *See Friedman*, 440 U.S. at 15; *Central Hudson Gas*, 447 U.S. at 563-64. In light of Lowe's history of deceptive, criminal conduct as an investment adviser, his publications may fairly be characterized as potentially deceptive commercial speech.

The appellees would have the SEC wait until Lowe had committed further violations of the securities laws and then somehow punish him while apparently permitting him to continue publishing. Such a remedy would hardly be effective redress for the affected public. The regulation of professions is intended to prevent harm to the public before it occurs, not after it is done. Saying that appellees may not sell their views as to the purchase, sale, or holding of certain securities is no different from saying that a disbarred lawyer may not sell legal advice. Thus,

we hold that the authority to revoke Lowe's registration as an investment adviser, and as a result to bar him from publishing his newsletters, does not violate the First Amendment.

Finally, we note what this holding does not entail. Lowe is not prohibited from publishing or stating his views as to any matter of current interest, economic or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely. He is not prohibited from publishing a newspaper of general interest and circulation. Nor is he prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer. What he is prohibited from doing is selling to clients advice and counsel, analysis and reports as to the value of specific securites or as to the advisability of investing in, purchasing or selling or holding specific securities.[7]

Judgment reversed.

VAN GRAAFEILAND, *Circuit Judge*, Concurring:

Although, ordinarily, I would be content simply to concur in Judge Oakes' thoughtful and well-reasoned opinion, the strong portest registered in Judge Brieant's dissent prompts me to pen this brief concurring opinion.

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[7] We leave to another day the question whether a publication dealing only with market indicators generally or making recommendations only as to groups of securities (e.g., air transport, beverages-brewers, mobile homes) could be barred on facts such as those of this case.

At the outset, I agree with Judge Oakes that, if a doctor must be licensed to write prescriptions and a lawyer to argue appeals, there is no reason why, in the public interest, an investment adviser should not be required to register before he can give investment advice. Where the standard for the granting of a license is "public interest, convenience, or necessity," the denial of a license on that ground, if provided for by statute, is not a denial of free speech. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943). It is now settled beyond dispute that, in performing its assigned duties, the SEC acts as a "statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975).

Congress was sufficiently concerned about violations of the Investment Advisers Act that it provided severe criminal penalties for willful violations thereof. 15 U.S.C. § 80b-17. The fact that the prohibited acts involve speech does not make them any the less unlawful. "The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof." *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982).

If the giving of investment advice by an unregistered investment adviser is unlawful, a court, after proper hearing, should be able to prohibit it, especially where the prohibited acts constitute a continuation of conduct already found to be unlawful. *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S.

489, 496 (1982), *Central Hudson Gas & Elec. Corp. v. P.S.C.*, 447 U.S. 559, 563-64 (1980); *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 389-90 (1973). A good illustration of the exercise of this constitutional power can be found in the use of injunctions to restrain unlawful trade practices. *See Nat. Soc. of Prof. Engineers*, 435 U.S. 679, 697 (1978). As the Court said in *Lorain Journal Co. v. United States*, 342 U.S. 143, 156 (1951), "Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others." In short, if, as the dissent agrees, "Lowe may not practice as . . . an investment adviser," he should not be permitted to give investment advice.

Judge Brieant's concern about the terms of the injunction to be issued by the district court is, I suggest, premature and fails to take into account the skill and ingenuity of Judge Brieant's colleagues in the district court. The activities of an investment adviser which Lowe unlawfully has been carrying on are described in 15 U.S.C. § 80b-2(a)11. Although, as a general rule, a district court should not content itself with issuing an "obey the law" injunction, it quite properly may frame the injunction in terms of the specific statutory provision which the court concludes has been violated. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972); *United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979). I have no doubt that, upon remand, the district court can frame an injunction so that Mr. Lowe "will know what the court intends to forbid."

BRIEANT, *District Judge*, dissenting:

I interpret the majority opinions as commanding the district court, without balancing the equities, to impose an injunction upon appellee Lowe and his affiliates which, at best, will be illusory and unenforceable, and at worst, constitutes a prior judicial restraint upon the publication of regularly issued journals of fact and opinion, "investment newsletters," therein described. Because I regard this prior restraint on publication as inappropriate; neither constitutional in light of the First Amendment; nor required by the Investment Advisers Act of 1940 ("the Act"); nor justified by our prior decisions; I respectfully dissent.

I

I agree that Lowe may not practice as, nor hold himself out to be, a registered investment adviser under the Act, nor may he engage in any fraudulent activity in connection with his publications. *Cf. SEC* v. *Capital Gains Research Inc.*, 375 U.S. 180 (1964); *Courtland* v. *Walston & Co.*, 340 F.Supp. 1076 (S.D.N.Y. 1972).

Lowe's investment newsletters, fairly described by the majority, are publications of the sort issued on a schedule, rather than timed for release attuned to specific market events. Delivered by mail, they are several days old when read, and convey the same facts and opinion to all readers. Typically such newsletters accept any subscriber who wishes to become such and is willing to pay the standard annual subscriber's fee. The expression of opinion by that means is poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.*, "Prevention Magazine") is from the practice of medicine, or a book advising how to avoid

probate is remote from the practice of law. The latter require a medical or law degree and a license, while the former are protected First Amendment expression. *See New York County Lawyers Association* v. *Dacey*, 21 N.Y.2d 694, *rev'g.*, 28 A.D.2d 161 (1967); Elman, Commr., *dissenting* in *Rodale Press, Inc., et al.* v. *Federal Trade Comm.*, 71 F.T.C. 1184, 1247-1253 (1967), *quoted with approval* by *Robinson, III*, J., concurring in *Rodale Press, Inc.* v. *Federal Trade Commission*, 407 F.2d 1252, 1258 (D.C. Cir. 1968).

An investor counseling with an adviser, directly, or by means of a telephone hotline, receives timely non-public advice, usually individualized, by which he hopes to gain an "edge" on others in the market. By reason of its clandestine or confidential character, such advice is particularly susceptible to fraud or manipulation. However, the contents of a newspaper are public when published, and the counsel so given is immediately known to all, including the watchful eyes of the SEC.

II

Discussion of the issue of so-called "commercial speech" by the majority is of great interest, but little assistance to the resolution of this case. In my view these newsletters are not "commercial speech," any more than our most respected daily newspaper is "commercial speech." Lowe is not selling securities or advertising investment advice; he is selling his publications themselves, and his editorial expression of the facts and opinions therein set forth. Like all publishers, Lowe charges subscription fees for his publications. I concede that the readers (subscribers) are seeking opinion and information to aid in their investment decisions, and Lowe intends this result.

When readers seek health information, they subscribe to health oriented publications, for spiritual advice they read religious tracts, and for astrology they read sidereal almanacs. Freedom of the press is not limited to the pamphleteer who hands out his tracts free of charge, nor is the right to write, and publish about investments without license limited to "bona fide publications of general and regular circulation," if those words found in the Act are to be read restrictively so as to exclude any paper eligible to be entered at the post office as second class mail matter. *See H.W. Wilson Co.* v. *United States Postal Service*, 438 F.Supp. 326 (S.D.N.Y. 1977), *aff'd.* 580 F.2d 33 (2d Cir. 1978) (construing prior statute).

With characteristic understatement, the court below termed "questionable" the SEC's contention that these publications constituted "commercial speech," 556 F.Supp. at 1366, and suggested that commercial speech is confined properly to instances of service or product advertising. On appeal, the SEC takes issue with this view, and the majority now rejects it as well, holding that commercial speech is sufficiently broad in scope to encompass the sale of a journal of fact and opinion to paid subscribers.

Our attention is directed to the several recent articulations of what constitutes "commercial speech," which are said to establish that "commercial speech" is not confined to advertising, but extends to all "expression related solely to the economic interest of the speaker and its audience." *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm.*, 447 U.S. 557, 561 (1980). Consideration of the Supreme Court's attempts at redefinition since *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) convinces me that the concept of commercial speech has now been confined to

naked advertising and closely related methods of commercial solicitation. A fair consideration of recent Supreme Court learning suggests that *Sec* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), relied on by the majority, is now as dead as Marley, and if not dead, readily distinguished.[1] Each recent Supreme Court commercial speech case has arisen in the context of service or product *advertising*. Thus, in addition to the ban on advertising by pharmacists, considered in *Virginia Pharmacy*, *supra*, the Court has addressed restrictions on attorney advertising and solicitation [*Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Matter of R.M.J.*, 455 U.S. 191 (1982)]; a ban on the use of "For Sale" signs by sellers of residential property [*Linmark Associates Inc.* v. *Willingboro*, 431 U.S. 85 (1977)];

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1 It must be noted that *Wall Street Transcript* was a "chilling" case, not a prior restraint case. When a contention is advanced that First Amendment rights are being chilled by official action, a Court is required only to balance the interest being served by the governmental action against the degree of chill. *See Waterfront Commission* v. *Local 1814, Longshoremen, etc.*, 667 F.2d 267 (2d Cir. 1981).

Similarly, *Savage* v. *Commodities Futures Trading Commission*, 548 F.2d 192 (7th Cir. 1977) relied on by the majority, is disinguishable. In *Savage*, Judge Moore was concerned only with the question of whether the Commission's order refusing petitioner's registration as a commodity trading adviser should be reversed. Although petitioner so argued, prior restraint of the press was not an issue in that case. The gist of *Savage* may be found in the comment by the Court that:

> "[I]t has long been recognized that the [First] Amendment does not remove a business engaged in the communication of information from general laws regulating business practices." Citing *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967).

I agree so long as prior restraint on publication is not involved. But see, *SEC* v. *Blavin*, 557 F.Supp. 1304, 1310 (E.D. Mich. 1983) in which, in addition to protecting the right to publish, the Court required the SEC to grant defendant registration as an investment adviser.

restrictions on the use of trade names by optometrists [*Friedman* v. *Rogers*, 440 U.S. 1 (1979)]; a ban on advertising by a public utility [*Central Hudson Gas, supra*]; and, most recently, a federal statutory restriction on advertising mixed with expressions of opinion by manufacturers of prophylactics [*Bolger* v. *Youngs Drug Products Corp.*, ____ U.S. ____, 51 U.S.L.W. 4961 (June 24, 1983)]. See also *Metromedia Inc.* v. *San Diego*, 453 U.S. 420 (1981) (restrictions on commercial and non-commercial billboard advertising).

That each of the cases in which the Court has sought to clarify the "commercial speech" doctrine has arisen in the context of attempts to regulate or prohibit advertising, while significant, does not, standing alone, demonstrate conclusively that commercial speech is restricted to advertising and equivalent economic promotional activities. However, examination of the characteristics of commercial speech which have caused the Supreme Court to accord to it a lesser degree of First Amendment protection demonstrate that since 1976 all speech so considered has been inextricably intertwined with advertising. Thus, in *Virginia Pharmacy Board, supra*, reference to commercial speech is in the context of a discussion of advertising, and the interests of both the advertiser and the consumer in the flow of commercial information. Support for the argument that commercial speech essentially comprises some sort of advertising or equivalent economic promotional activity is also found in *Central Hudson Gas, supra*, in which the Court invalidated a New York State regulation prohibiting the promotion of electricity consumption through advertising. The Court in that case addressed the interests served by commercial expression: "In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government

has the complete power to suppress or regulate commercial speech . . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." 447 U.S. at 562 (citations omitted). Significantly, the Court in *Central Hudson Gas* states that the very basis of the First Amendment's concern for commercial speech is the "*informational function of advertising*." *Id.* at 563, emphasis added.

Of greatest interest, probably because it is most recent, is *Bolger* v. *Youngs Drug Products Corp.*, *supra*, where the Court unanimously invalidated a Postal Service prohibition of unsolicited mailings, one of which conveyed "truthful information relevant to important social issues such as family planning and the prevention of venereal disease." (Marshall, J. at 51 U.S.L.W. 4963). The Court noted that some content-based restrictions on commercial speech are justified in light of the "greater potential for deception or confusion in the context of certain advertising messages" (51 U.S.L.W. at 4962), but also held that "the mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech," citing *New York Times* v. *Sullivan*, 376 U.S. 254, 265-66 (1964), *id.* at 4963.[2]

I conclude that in the wake of *Bolger*, commercial speech which goes beyond mere advertising, so as to

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2 One of the pamphlets in *Bolger* purported to be an expression of fact and opinion rather than an advertisement. In an inconspicuous place, it bore the self-serving statement that it was "contributed as a public service" by Youngs Drug Products Corp. See n. 4, *Bolger*, *supra*, 51 U.S.L.W. at 4962. There is no bright line by which an advertisement can be distinguished on its face from a statement of fact and opinion *actually* presented as a public service by a commercial enterprise. Nor is there any reason to believe that a corporation has less First Amendment rights than an individual.

include expression of fact and opinion implicating (as does an investment newsletter or a health newsletter, or even a racetrack tout sheet), "substantial individual and societal interests" (*id.* at 4963), now enjoys full First Amendment protection, at least insofar as prior restraint is concerned. In short, even if these newsletters were commercial speech, which they are not, I believe they would be entitled to full First Amendment protection from prior restraint. As Justice Rehnquist, concurring in *Bolger* observed, "the First Amendment, which was designed to prevent the government from suppressing information, requires us 'to assume that this information is not in itself harmful, that people will perceive their own interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them,' [citation omitted]." *Id.* at 4966.

In explaining why commercial speech should be entitled to a lesser degree of First Amendment protection than other communication, the Court, both in *Virginia Pharmacy Board* and *Central Hudson Gas*, *supra*, relied on two aspects of commercial speech which set it apart:

> "First, commercial speakers have extensive knowledge of *both* the market *and their products*. Thus, they are well situated to evaluate the accuracy of their messages and the unlawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." *Central Hudson Gas*, 447 U.S. at 564, n. 6, citations omitted, emphasis added. *See also Virginia Pharmacy*, 425 U.S. at 771-72, n. 24.

The difference between such "commercial speakers" mentioned in *Central Hudson Gas* and Lowe are readily apparent. The publishers here are not selling their own investments, nor are they urging their subscribers to invest in a business in which the defendants have a financial stake. Lowe's publications do not comment about *his own products*; they analyze and evaluate the securities offered by third parties. In this respect, the investment newsletters do not differ in principle from well-known periodicals such as *Barron's*, *Forbes*, or *Consumer Reports*. Presumably, the majority would not contend that insofar as these publications of general circulation perform a similar function, they would become subject to similar licensure or prior restraint.

In addition to linking advertising to commercial speech, the Court in *Virginia Pharmacy* reiterated an earlier definition of commercial speech as expression which does "*no more than* propose a commercial transaction." *Id.* at 762, quoting *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 385 (1973) (emphasis added). Enough has been said concerning the contents of the Lowe newsletters to demonstrate that they do more than "propose commercial transactions."

Finding commercial speech to be "squarely" presented in *Virginia Pharmacy Board*, the Court stated that this was because the pharmacist challenging the Commonwealth's restrictions on his advertising:

> "does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you X prescription drug at the Y price.' " 425 U.S. at 761.

Here, in contrast, the appellees *do* seek to report "newsworthy facts" and make "generalized observations" about economic and financial conditions as well as recommending stocks and issuers, the latter inextricably entwined with the former.

We address here not the power to regulate, or punish fraud after publication, but the power to impose prior restraint. Investment opinion, in my opinion, is as much speech protected from prior restraint as is political opinion, philosophy or gibberish. Not only for the Zengers, the Patrick Henrys and the Ellsbergs was this basic freedom secured, but also for an ex-convict whom the majority assumes to be motivated towards recidivism.

A judicial system which will not enjoin a libel [*Brandreth* v. *Lance*, 8 Paige Ch. 24 (N.Y. 1839)], and will not enjoin publication of the Pentagon Papers [*New York Times Co.* v. *United States*, 403 U.S. 713 (1971)], should not countenance a prior restraint on publication of a regularly issued newsletter containing fact and investment opinion. Even if Lowe's publications constitute commercial speech, the prior restraint sought to be imposed is unconstitutional. In *Central Hudson Gas*, *supra*, the Court held that restraints will be upheld only if "the regulation directly advances the governmental interest asserted," and "it is not more extensive than is necessary to serve that interest." 447 U.S. at 566. These restraints do not qualify. See *infra*, p. 13.

Any prior restraint comes to Court with a "heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963). This results from the devastating impact prior restraints have on the exercise of First Amendment rights, far exceeding a mere "chill":

"Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech. They differ from the imposition of criminal liability in significant procedural respects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt; the violator of a statute punishing speech criminally knows that he will go before a jury, and may be willing to take his chance, counting on a possible acquittal. A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." Bickel, *The Morality of Consent*, 61 (1975), quoted with approval in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 559 (1976).

Because of this devastating effect on freedom of speech, previous restraints will be upheld only in "exceptional" cases, *e.g.*, the "threat of a grave and immediate danger to the security of the United States," *United States* v. *New York Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev'd on other grounds*, 403 U.S. 713; see also Brennan, J. concurring in *New York Times*, *supra*, 403 U.S. at 726.[3]

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3 There is no clear and present danger shown to the national security which would justify such an injunction. The majority apparently assumes that because of his criminal record and allegedly bad character, Lowe is more likely to publish false ideas than are others, but not if he is working for somebody else's paper. This is illusion, and threatens disaster.

III

To affirm the trial court here, it is not necessary, in my view, to hold that the Act is facially unconstitutional as a press licensing scheme. Certainly it was not so intended; Congress understood about the First Amendment. Its legislative product should not lightly be construed as intended to effect an unconstitutional result nor to impose an undue or useless degree of regulation upon a constitutionally protected activity. However, if the provision of the Act which exempts a "bona fide [publication] of general and regular circulation," found at 15 U.S.C. § 80b-2(11) (1976), is to be read as literally and narrowly as the majority would have it, this means to me that some judge, at the instance of the SEC, will be called upon to adjudicate the *bona fide vel male fide* of a newspaper, to determine if it is to be subject to prior restraint should it contain investment opinion or "recommend" a security. This leaves a dangerous editorial evaluation in hands not to be trusted with such a decision, and requires a determination for which no satisfactory objective standard is provided. We have held "Courts should be chary of deciding what is and what is not news" [Meskill, J. dissenting in *Harper & Row Publishers Inc.* v. *Nation Enterprises*, ____ F.2d ____ (2d Cir. November 17, 1983, Dkts. 83-7277, 83-7327, slip op. at 213), a view adopted by majority op. at 194]. I suggest we must be even more chary in undertaking to determine when or whether a publication is "bona fide," unless such words are regarded as broad enough to comprise *all* regularly issued publications containing fact and opinion and available to all who would subscribe, as Lowe's newsletters are.

The Act, as construed by the majority seems both under and over inclusive. In theory, Lowe's entire expres-

sion of views could appear in our favorite local newspaper without official hindrance. Suppose following remand, Lowe should transfer stock ownership of his corporations to a friend and add to his newsletters a tidetable, a list of ship arrivals, Ann Landers, a crossword puzzle and selections reprinted from *Areopagitica*? Would his newsletters now be *bona fide* newspapers, in the eyes of the majority? I submit that on First Amendment and prudential grounds a decision that they would not be is beyond the power of any court to make. In short, I do not question the power of government to license lawyers, doctors, accountants, registered representatives employed by stockbrokers and those giving individualized investment advice or holding themselves out as investment advisers, and similar professionals. However, the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers.

Licensing of the press was abandoned in England in 1694, but the memories of this imposition upon the natural rights of man lingered sufficiently to lead to the enactment of the First Amendment almost a century later. An intention to disregard this vital Constitutional imperative should not lightly be imputed to Congress.

I would construe the Act essentially as did the court below. In this connection, I am puzzled by the provision in the majority opinion (slip op. at 22), which provides that Lowe is "not prohibited from publishing a newspaper of general interest and circulation, nor is he prohibited from publishing [investment] recommendations in *somebody else's bona fide* newspaper as an employee, editor or writer." (Emphasis added).

I fail to see how it can be adjudged that Lowe can exercise his First Amendment protected expressions as to

investments, but only so long as he is not himself the owner or proprietor of the publication in which his views appear. Such a distinction must assume that the owner or proprietor of a *bona fide* newspaper will exercise some control over Lowe's writings so as to prevent fraud. There is no assurance that this would be so. And I am appalled by the thought that in order to enforce the injunction to be granted on remand, the trial court may be required to snoop into the corporate records of a publication to find out whether it is directly or indirectly owned by Lowe, in order to make the adjudication as to whether or not it is "*somebody else's* bona fide newspaper." A court of equity should not utter an injunction which might give rise to such intrusions in a First Amendment protected area such as a newspaper office.

IV

There are prudential reasons apart from the Constitutional issues heretofore discussed, which militate against the granting of injunctive relief in the form directed by the majority.

I cannot express a better description of a typical investment newsletter than that found in the majority opinion; whether in recommending specific stocks or predicting near and long term market trends, Lowe, and the typical investment newsletter writer is in effect "publishing or stating his views as to any matter of current interest, economic or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely." (Majority slip op. at 22). Yet that is what the majority says Lowe is

not, on remand, to be prohibited from doing. He will become a criminal contemnor if, but only if, he writes and publishes "as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." (Slip op. at 23). While footnote 6 of the opinion purports to reserve decision (*i.e.*, "leave to another day") as to whether Lowe may publish "dealing with market indicators generally," and "making recommendations only as to groups of securities," (slip op. at ii, n. 6), no logical basis is presented for the court on remand to allow the recommendation of groups of securities but not individual stocks. Faced with the necessity of framing an injunction which preserves Lowe's conceded right to express his views as to the effect of current events on market conditions, and yet prevents any "recommendation" of specific securities, the district judge will be confronted with extreme difficulty. The injunctive decree of a court of equity must be intelligible and practical; it must draw a bright line, and should produce benefits at least equal to its social burdens. Equity requires that those enjoined receive "explicit notice of precisely what conduct is allowed." *Schmidt* v. *Lessard*, 414 U.S. 473 (1974). In *Diapulse Corp. of America* v. *Carba Ltd.*, 626 F.2d 1108, 1111 (2d Cir. 1980) we held, per Judge VanGraafeiland:

> "A court is required to frame its orders so that those who must obey them will know what the Court intends to forbid . . . . It is for this reason that Fed.R.Civ.P. 65(d), like its predecessor. provides that every order granting an injunction shall be specific in terms and describe in reasonable detail the acts sought to be restrained. An order which does not satisfy the requirement of specificity and definiteness will not withstand appellate scrutiny."

See also, United States v. *Charmer Industries, Inc.*, ____ F.2d ____ (2d Cir. November 30, 1983) (*Charmer II*) *Schurr* v. *Austin Galleries of Illinois, Inc.*, ____ F.2d ____ (2d Cir. October 5, 1983) (slip op. at 6814, Van Graafeiland, J. concurring).

This requirement is especially important where First Amendment freedoms are implicated. *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). The injunction which the majority commands cannot be framed in compliance with the directions given, so as to insure that constitutionally protected expression will not be stifled, along with the investment advice on specific issues which the Court finds Lowe may no longer express.

In a case involving an attempt to enjoin the showing of motion pictures, the Fifth Circuit noted the difficulty inherent in attempting to enjoin future expression on the basis of unprotected past conduct, where a statute permitted the closing for one year of any theatre which had exhibited an obscene film:

> "Thus, [under the statute] future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota*." *Universal Amusement Co., Inc.* v. *Vance*, 587 F.2d 159, 165 (5th Cir. 1978).

While stated in the context of an attempt to prevent obscenity, the Fifth Circuit's reasoning is applicable to this case as well. In light of the difficulty of framing an injunction which would prevent Lowe from recommending specific securities, while at the same time preserving

his right to comment on "any matter of current interest," any injunction issued will have the effect of stifling constitutionally protected expression, thus amounting to an impermissible prior restraint on publications which have not yet been found to constitute "investment advice." *Cf. Universal Amusement Co., Inc., supra* at 169. Lowe's difficulty in knowing what will violate the terms of an injunction formulated according to this Court's directive will result in "self-censorship, a particularly subtle and most insidious form of the malady" of prior restraint. *Universal Amusement Co, Inc., supra* at 166.

Probably, following remand, this articulate litigant will demonstate what a panel of this Court has previously described as an "ability to improvise and [a] flair for the creative" and bring about the same difficulty encountered when, in response to an overly broad injunction, oenologist Walter S. Taylor began to refer to himself as "Walter S. Xxxxxx," and depict himself on his wine bottles in a "Lone Ranger" type mask. *See Taylor Wine Co., Inc.* v. *Bully Hill Vineyards, Inc.*, 590 F.2d 701, 702-03 (2d Cir. 1978).

Injunctions which are unclear or easily set at naught should not be issued in the first place. There exists already more than adequate statutory protection, both penal and civil, against mail fraud, wire fraud, securities fraud and breach of fiduciary duty in writing about investments. An injunction of this sort, particularly because of its illusory character, will add little to the protection of the public. This is especially true in this case because the majority will apparently allow Lowe to express his opinions freely and without limitation "in somebody else's bona fide newspaper as an employee, editor, or writer" (slip op. at 22).

Any balancing of the equities, essential before any injunction is granted, should weigh the benefit to the public (nil in this case because of the injunction's vague, subjective and illusory nature) against the burdens on those enjoined, severe in this case because free expression may be enjoyed only at great personal risk to Lowe, or his potential news publishing employers who might have to prove they are *bona fide* and not indirectly owned by Lowe.

This is not to mention the impossible burden of enforcement imposed on the district court.[4]

And for what is all this great effort? I agree with Chief Judge Weinstein below that "the censorship that the SEC would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public," (556 F.Supp. at 1366) and therefore a balancing of the equities requires that no injunction issue.

Essentially for the foregoing reasons, as well as those expressed by Chief Judge Weinstein in his opinion below, I believe that the judgment appealed from should be affirmed.

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4 There are probably a thousand and one ways to recommend a specific stock without using the word "recommend." Any puff piece published to investors about a business or an industry in effect "recommends" the stock thereof. The court below following remand would seem to be at a loss to determine whether a contempt has been committed, or not, so long as the evil word "recommend" is not used.

Memorandum and Order

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

CHRISTOPHER L. LOWE a/k/a CHRIS L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION, LOWE STOCK CHART SERVICE INC.,
Defendants.

No. 82 Civ. 1616.

United States District Court,

E.D. New York.

Feb. 1, 1983.

WEINSTEIN, Chief Judge:

The Securities and Exchange Commission seeks an order enjoining Christopher Lowe and his corporations from publishing investment advisory materials. Jurisdiction is premised on Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-14 (1976). Lowe has been barred by the SEC from associating with any investment adviser and Lowe Management Corporation's investment adviser registration has been revoked.

Despite the substantial government interest in maintaining the integrity of the securities industry and the legitimate

concern of the SEC about possible publication abuse, an injunction against publication must be denied except in a minor respect designed to insure against personal professional contact between Lowe and his readers. The Advisers Act, reasonably construed to avoid an impermissible encroachment on first amendment freedoms—particularly in light of available alternatives for safeguarding the public—does not authorize such prior restraint.

I.

Facts

The SEC's lack of confidence in Lowe is not without basis. He was convicted in New York in 1977 of appropriating funds of an investment client and of failing to file as an investment adviser with New York's Department of Law. In 1978 he was convicted of tampering with evidence to cover up fraud on an investment client and of stealing from a bank. A New Jersey court sentenced him to three years imprisonment in 1982 on two counts of theft by deception through issuance of worthless checks.

Nevertheless, Lowe's urge to share his knowledge of finance continues unabated. Directly and through various corporations, he is responsible for a number of publications:

1. *The Lowe Investment and Financial Letter* is a market newsletter. A typical issue contains general observations on and assessments of the securities and bullion markets, a review of numerous market indicators, market strategies, and specific recommendations for buying, selling, or holding stocks and bullion. The newsletter is advertised as a semi-monthly publication, but at least since May 1981,

it has appeared only at irregular intervals, with a total of eight issues appearing from that time through August 31, 1982. According to the publisher a year's subscription ordinarily costs $195, but a promotional subscription has recently been offered at reduced rates, from $39 for one year to $79 for three years. The newsletter presently has approximately 2,408 subscribers whose subscriptions vary in length from three months to three years.

2. *The Lowe Stock Advisory* also analyzes and comments on the securities and bullion markets. This market letter specializes in low-priced stocks—costing under $20—listed on the New York and American Stock Exchanges and traded in the over-the-counter market. Potential subscribers are advised that they will receive periodic letters with market information and analysis and updated recommendation sheets on specific securities. Since May 1981, only four letters have been published and distributed, the last of which was dated November 16, 1981. They have included recommendations on various stocks. Lowe Stock Advisory subscriptions cost between $39 for one year and $79 for three years. Subscribers to the Lowe Investment and Financial Letter have been offered a complimentary six-month subscription. The publication has approximately 278 paid and 397 unpaid subscribers.

Both the Lowe Letter and Lowe Stock Advisory advertise a telephone hotline. Subscribers can call to get current information.

3. *The Lowe Stock Chart Service* has been advertised as a weekly publication containing charts for all stocks listed on the New York and American Stock Exchanges and

for the 1,200 most widely traded over-the-counter stocks. It will also contain charts on gold and silver prices and market indicators. No investment advice will be offered. No issues of this publication have yet been distributed, though two announced dates for initial publication have come and gone. Regular subscription rates for the chart service run from $325 for three months to $900 for one year, with a special pre-publication offer including a $33 five-week trial. There are some forty subscribers to this publication.

Subscribers to these services called as witnesses by the SEC generally were satisfied with what they received. Their main complaint was the lack of regularity of publication—an understandable problem in view of the amount of time the publisher has been devoting in recent years to defending himself before federal and state law enforcement agencies.

In 1979 the SEC instituted administrative proceedings against Lowe and Lowe Management Corporation. These culminated on May 11, 1981 in the Commission's order under section 203(e), (f) of the Advisers Act, 15 U.S.C. § 80b-3(e), (f) (1976), revoking the registration of the Lowe Corporation as an investment adviser and barring Lowe from association with any investment adviser. Advisers Act Release No. 759. The Commission based its order on an administrative law judge's finding that Lowe had misappropriated client funds (in the case leading up to Lowe's plea in New York State court to tampering with evidence) and that Lowe Corporation had failed to promptly amend its investment adviser registration (Form ADV) to disclose Lowe's New York convictions, in violation of section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976), and Rule 204-1(b), 17 C.F.R. § 275.204-1(b) (1982). Lowe argued

before the Commission that he had ceased to handle clients' funds and securities and was engaged solely in the publication of investment newsletters, so that the sanctions sought to be imposed were inappropriate and excessively severe. The Commission, however, agreed with the administrative law judge that the defendants' publication activities harbored "opportunities for dishonesty and self-dealing."

In the present suit the SEC alleges that the defendants have engaged in the business of an investment adviser without being registered pursuant to section 203(c) of the Advisers Act, 15 U.S.C. § 80b-3(c) (1976); that by not revealing to their subscribers Lowe's criminal convictions and the 1981 order of the Commission, they have engaged in fraudulent practices in violation of section 206 of the Act, 15 U.S.C. § 80b-6; and that in publishing the investment newsletters, they are in violation of the Commission's 1981 order, which is itself judicially enforceable under section 209 of the Act, 15 U.S.C. § 80b-9. The SEC seeks an order enjoining further publication by the defendants of investment advisory materials and enforcing the Commission's 1981 order, and an order directing defendants to disgorge all subscription monies received since 1981 in connection with their publications.

II.

Law

The central issue is whether the SEC is authorized to withhold registrant status of anyone seeking to sell impersonal investment advice through subscription newsletters and by this denial to cut off publication. A further question

is whether, under the statute and the rules and regulations of the Commission, defendants had a duty to disclose to their subscribers Lowe's convictions and the 1981 order of the Commission, so that their failure to do so constituted a fraud in violation of section 206 of the Act, 15 U.S.C. § 80b-6 (1976).

A. *Advisers Act*

Section 202(a)(11) of the Act, 15 U.S.C. § 80b-2(a)(11) (1976), defines "Investment Adviser" broadly. It includes:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . .

The section provides an exemption for, inter alia, "(D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Congress concluded that publications providing general business and financial information pose less dangers to the public than specialized advisory publications designed particularly for potential investors. Given the limited resources available to the SEC, Congress was entitled to direct the government's finite powers of enforcement to the point of maximum danger.

The registration requirement and the relevant powers of the Commission are set forth in section 203, 15 U.S.C. § 80b-3 (1976). They are designed to control advisers and

to prevent those who are not registered from giving investment advice. Subsection (a) declares it

> unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

Under subsection (c) the Commission is authorized to grant or deny applications for registration and under subsection (e) to censure, place limitations on the activities, functions, or operations of, suspend or revoke the registration of any investment adviser. The statutory grounds for imposing sanctions against registered advisers include having been convicted of any crime that "involves . . . the making of a false report . . . [or] perjury," or "involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities." 15 U.S.C. § 80b-3 (e)(2). Subsection (f) empowers the Commission to censure, place limitation on, suspend, or bar the association of any person with an investment adviser.

These provisions of the Advisers Act are part of the comprehensive federal regulation of the securities industry. The impetus for federal securities regulation was the irresponsible and dishonest securities practices of the 1920's. H.R.Rep. No. 85, 73d Congress 1st Sess. 2 (1933); Landis, The Legislative History of the Securities Act of 1933, 28 Geo.Wash.L.Rev. 29, 30 (1959). Although the most pressing concerns of the drafters of the early securities laws were with issuers and underwriters, brokers and dealers, insiders and manipulative traders whose activities were most clearly and directly responsible for the collapse of the market,

journalists were also implicated in securities deceptions. The Senate Report on the Securities Exchange Act of 1934 noted

> that it was not uncommon for market operators to employ a publicity agent to tout a stock in which they were momentarily interested. In one instance a financial writer on a great New York newspaper was discovered to have been a regular participant in the profits of a free-lance trader, without obligation except to publicize the stocks of the trader. Another witness admitted that his business was "financial publicity," and that his articles were published for the purpose of interesting the public in the stock in which he and those who employed him were interested, thereby causing the market value of the stock to increase; and for his work he was paid by calls and options. Still other cases were observed where persons were employed to broadcast over the radio, ostensibly as economists tendering gratuitious advice, but in reality as publicity agents of stock-exchange firms.

S.Rep. No. 792, 73d Cong., 2d Sess. 8 (1934). A more particular account of potential and actual abuses in the publication of market newsletters and impersonal investment recommendations is found in the Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess., Pt. 1, 330-44, 359-69, 535-39 (1963). ("SEC Special Report"). *See also, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963) (publisher's practice of buying securities for his own account shortly before recommending them in his newsletter); *Courtland v. Walston & Co.*, 340 F.Supp. 1076 (S.D.N.Y.1972) (investment adviser's practice of recommending stocks to his pri-

vate customers prior to making similar recommendations in his "influential and highly regarded weekly market letter"); *Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) (financial columnist reported favorably on a stock after purchasing 5,000 shares at a discount).

The justification for government oversight of investment advisory publications is apparent. After the fact sanctions against offenders would likely prove inadequate. When an advisory service has improperly touted a stock and artificially inflated its price, the numerous investors who have relied on the recommendation and are hurt when the price of the stock subsequently collapses may be without redress. Assuming the publisher might be financially liable under the securities laws, *see Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir.1979), *but see Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), he may be unable to make restitution for the losses he has caused. Investors may encounter difficult problems of proof or may be unaware of the source of their injury. While criminal sanctions are provided in section 217 of the Advisers Act, 15 U.S.C. § 80b-17 (1976), they may not serve as an effective deterrent, given their necessarily spotty enforcement.

The principal mode of regulation employed in the securities laws is one of prophylactic disclosure rather than restraint. In his letter to Congress recommending passage of the Securities Act of 1933, President Roosevelt disclaimed any attempt at substantive government evaluation of securities offered to the public. Rather, the purpose of the legislation was to add

> to the ancient rule of caveat emptor, the further doctrine "let the seller also beware." It puts the burden

> of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence.

President's Message to Congress of March 29, 1933, *reprinted in* H.R.Rep. No. 85, 73d Cong., 1st Sess. 1, 2 (1933). A similar observation has been made by the Supreme Court with regard to the Advisers Act. In common with the other securties laws,

> [a] fundamental purpose [of the Advisers Act] was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186, 84 S.Ct. 275, 280, 11 L.Ed.2d 237 (1963). *See also* 2 L. Loss, Securities Regulation 1396 (1961).

The disclosure philosophy has been employed in several ways to combat abuses committed by those who provide publicity for securities or render investment advice. Section 17(b) of the Securities Act of 1933, 15 U.S.C. § 77q(b) (1976), makes it unlawful to give publicity to a security for consideration without fully disclosing the receipt and amount of such consideration. Section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976), empowers the SEC to require investment advisers, including those in the business of pubishing advisory materials, to make and disseminate prescribed reports. Pursuant to this section the Commission has required every investment adviser whose registration is effective or pending to file Form ADV, containing detailed information on the adviser's background and expertise. Advisers Act Rules 204-1, 279.1, 17 C.F.R. §§ 275.204-1, 279.1 (1982). Rule 204-3, 17 C.F.R. § 275.204-3 (1982), requires

certain advisers to provide some of this information to their clients. In response to documented abusive practices in the advertising for investment advisory services, including those promoting subscription publications, *see* SEC Special Report at 367-69, the SEC promulgated Rule 206(4)-1, 17 C.F.R. § 275.206(4)-1 (1982), under the anti-fraud provisions of section 206 of the Advisers Act, 15 U.S.C. § 80b-6 (1976). Among the provisions of the Rule is one that requires any advertising that makes reference to a successful past recommendation to offer to disclose all other recommendations made by the adviser within the preceding year.

The securities laws are sprinkled with provisions providing for restraints on practices that present dangers despite the most full and candid disclosure. The SEC has the authority to deny or revoke the registration of broker-dealers, 15 U.S.C. § 78*o*(b) (1976), and it is uncontested that the Commission has similar authority under section 203 of the Advisers Act, 15 U.S.C. § 80b-3 (1976), with respect to investment advisers who render personal investment advice. The direct contact that these professionals have with clients and the control they may exercise over client funds justify strong sanctions in the way of prior restraints against those among them who have been guilty of misconduct.

The newsletter publisher, however, plays a role different from that of the broker-dealer or personal adviser, so that observations and procedures directed toward securities practitioners generally are not necessarily applicable to him. For example, in enacting the anti-fraud provisions of the Advisers Act Congress observed that the "occupations [of broker-dealers and advisers] involve similar delegations of trust and responsibility." S.Rep. No. 1760, 86th Cong.,

2d Sess., 1960 U.S.Code Cong. & Admin.News 3502, 3504. The analogy is apt for the personal adviser, but not for the editor of a market publication who has no direct person-to-person contact with his readers and to whom there is no delegation of authority.

In the Advisers Act the common grouping of personal and impersonal advisers need not imply that Congress intended that they be treated identically under all provisions or for all purposes. In particular, Congress may have assumed that disclosure of past misdeeds alone would be inadequate protection against an adviser who, through personal contact, could improperly dilute the force of such disclosure. The only effective protection would be a bar to the adviser's practice. But Congress might have concluded that disclosure was adequate in the case of an impersonal client who could more calmly weigh the gravity of the publisher's misdeeds against his advisory qualifications and in an unpressured atmosphere decide to accept or reject the publisher's services or recommendations.

Admittedly there is no suggestion on the face of the statute that persons whose only advisory activity is the publication of impersonal investment suggestions, reports, and analyses should be treated differently under section 203 from other persons within the definition of investment adviser contained in section 202. Nevertheless, this interpretation is suggested by constitutional considerations.

B. *First Amendment Considerations*

The constitutional protection afforded published investment advice may hinge on the characterization of this form of speech. The SEC has urged that it be classified as commercial speech, and thus subject to a greater degree of regulation and restraint than other publications. Even under the unfolding doctrines of commercial speech, however, restraint of subscription advisory material would pose serious constitutional questions.

The Supreme Court's most recent pronouncements in this area have set forth criteria under which commercial speech may be restrained. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980) provides a four-part test: 1) determine first whether the publication "concern[s] lawful activity and [is] not . . . misleading". If so the restraint will be upheld only if 2) "the asserted government interest is substantial"; 3) "the regulation directly advances the governmental interest asserted"; and 4) "it is not more extensive than is necessary to serve that interest."

The focus of this and other Supreme Court commercial speech cases has been on product and service advertising. In this regard the Court has noted that "the potential for deception and confusion is particularly strong in the context of advertising professional services." *In re R——— M. J* ——, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982). The Court, nevertheless, adhered to the principle that "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.* The remedy against the potential for misleading advertising "in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *Id.*, citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 375, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977). These guidelines are presumably of general application in the commercial speech context.

Applying the Supreme Court's analysis, subscription advisory material is entitled to constitutional protection since it constitutes lawful activity and is not necessarily misleading. As indicated earlier, the government has a clear and substantial interest in preserving the integrity of the securities markets and preventing the demonstrated abuses that have attended dissemination of impersonal investment advice and analysis. It may be conceded that a regulatory regime under which a publication license could be denied those with a history of criminal fraudulent conduct would advance the government interest. Such individuals are reasonably suspect of a greater tendency to engage in abusive practices than are others whose records are free of the taint of trickery.

Nevertheless, publication restraint fails to meet the fourth criteria articulated in *Central Hudson Gas* for restricting commercial speech. Given the disclosure mechanisms available to the SEC to put subscribers on their guard against interested investment advice, the censorship that the SEC would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public. *Cf. Friedman v. Rogers,* 440 U.S. 1, 11-13, 99 S.Ct. 887, 895-96, 59 L.Ed.2d 100 (1979) (upholding ban on trade names in the practice of optometry because trade names are subject to manipulation through use without explanation).

Prepublication restraints are ordinarily justifiable only where the non-protected character of the content is ascertainable with "relative certainty" prior to dissemination. *See* L. Tribe, American Constitutional Law 730 (1978). Even in the context of commercial speech speculative assess-

ments may not be relied upon to curb first amendment exercise where the less drastic alternative of disclosure exists.

While a commercial speech analysis demonstrates the constitutional infirmities of publication restraint in this case, the SEC's premise that investment advisory publications constitute commercial speech is itself questionable. The Supreme Court has defined commercial speech as "speech which 'does no more than propose a commercial transaction,' " *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976), *quoting Pittsburgh Press Co. v. Human Relations Commission,* 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973). *See also Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 562, 100 S.Ct. 2343, 2349, 65 L.Ed. 2d 341 (1980). It has alternatively been described as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas,* 447 U.S. at 561, 100 S.Ct. at 2349, *quoted in In Re R—— M. J——,* 455 U.S. 191, 204 n. 17, 102 S.Ct. 929, 938 n. 17, 71 L.Ed.2d 64 (1982). Despite the broader sounding reach of the latter articulation, the cases employing the commercial speech doctrine have uniformly dealt with product or service advertising. *See Ad World, Inc. v. Township of Doylestown,* 672 F.2d 1136, 1140 (3d Cir. 1982).

Investment advisory material disseminated to the public is not commercial advertising of a product or service. Such publications are not the words of a seller peddling his own wares or services, but those of an apparently detached observer commenting on the value of choses offered or held by others. To be sure the investment publisher has a financial motivation to disseminate his analyses and recommendations, but so may the literary publisher or political

pamphleteer. Their motivations differ in kind from the monetary incentives characteristic of the advertiser of a particular product. The difference reflects in part basic distinctions "between commercial price and product advertising, on the one hand, and ideological communication on the other." *Virginia State Board of Pharmacy,* 425 U.S. at 779, 96 S.Ct. at 1834 (Stewart, J., concurring).

Recommendation of particular securities is somewhat dissimilar from "[i]deological expression, be it oral, literary, pictorial, or theatrical, [that] is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man." *Id.* But there is no clearly defined perimeter that circumscribes the universe of ideological thought. Economic discussion addresses issues of public concern and qualifies as ideological debate. *See, e.g.,* P.A. Samuelson, Economics, *passim* (11th ed. 1980) (particularly chapter 42, "Winds of Change: Evolution of Economic Doctrine"); A. Alchian & W.R. Allen, Exchange and Production: Competition, Coordination and Control, Preface (2d ed. 1977); H.G. Manne, The Economics of Legal Relationships 1-3 (1975). The state of the nation's economy and finances is often an issue uppermost in the minds of voters, and politicians regularly point to the performance of the stock market as an index of public confidence in their office. There exists, moreover, no sharp demarcation in the range of economic observation that runs from comment on economic policy to prediction of the performance and recommendation of specific securities. Financial news and analysis is persistently flavored with projected consequences of political events and both may form the predicate for particular investment advice.

The content of the Lowe Investment and Financial Letter illustrates these points. In a typical issue, dated Decem-

ber 11, 1981, the publisher combines factual observations and speculative predictions on market behavior with recommendations on specific securities. The publisher also offers general comments and specific recommendations on the gold and silver markets. Among the observations prefacing advice on bullion investment is a prediction of "increased inflation, worldwide economic havoc, and greatly increased worldwide political turmoil; and in fact, even a world war or major war somewhere . . . which will be fuel in gold's price rise." *Id.* at 7. Attempting to precipitate out the various types of speech present in this mixture is an exercise of doubtful constitutional utility. *See Ad World, Inc. v. Township of Doylestown,* 672 F.2d 1136 (3rd Cir.1982) (tabloid almost entirely devoted to advertising with small amounts of consumer and community information entitled to first amendment protection).

It may be true "that the activities involved in giving commercial investment advice are [not] entitled to the identical constitutional protection provided for certain forms of social, political, or religious expression." *SEC v. Wall Street Transcript Corp.,* 422 F.2d 1371, 1379 (2d Cir.), *cert. denied,* 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970). "[R]estrictions [that] would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office" may be permissible with regard to other forms of non-commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S 748, 778 n. 3, 96 S.Ct. 1817, 1833 n. 3, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring) (referring to labor relations). *See Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976) (plurality opinion). *Cf.*

Note, Peaceful Labor Picketing and the First Amendment, 82 Colum.L.Rev. 1469 (1982). Nevertheless, the combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters places them outside the rubric of commercial speech and raises unanswered questions concerning the conditions, if any, under which an absolute restraint may constitutionally be imposed upon them. *Cf. Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

C. *Construction of Advisers Act*

One approach to the constitutional difficulties posed by the SEC's interpretation of the Investment Advisers Act would be to declare the Act unconstitutional as it applies to investment advisory publishers. Such an approach would seriously impede the regulation of securities markets. Its effect on investors as well as those in the securities business might be highly damaging. It seems doubtful that Congress or the SEC would welcome such a result. To the contrary, Congress has apparently encouraged a flexible approach in the interpretation and execution of the Advisers Act so as to advance the public good. To this end it has provided that

> [t]he Commission, by rules and regulations . . . may conditionally or unconditionally exempt . . . any class . . . of persons . . . from any provision [of the Act] . . . to the extent that such exemption is necessary or appropriate in the public interest . . . .

Section 206A of the Advisers Act, 15 U.S.C. § 80b-6a (1976). A similar liberality is called for in the construction of the Advisers Act to preserve its constitutionality and basic design.

Rather than adopt an interpretation that "might collide with the guarantees of the First Amendment," *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits),* 377 U.S. 58, 63, 84 S.Ct. 1063, 1066, 12 L.Ed.2d 129 (1964), the Act should be construed to steer clear of possible infringements on freedom of the press. As the Supreme Court has recently reminded us,

> We consider the statutory question because of the " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.' " *Lorillard v. Pons,* 434 U.S. 575, 577 [98 S.Ct. 866, 868, 55 L.Ed.2d 40] (1978), *quoting Crowell v. Benson,* 285 U.S. 22, 62 [52 S.Ct. 285, 296, 76 L.Ed 598] (1932).

United States v. Security Industrial Bank, —— U.S. ——, ——, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982). *See, e.g., United States v. Security Industrial Bank,* (giving a prospective reach to certain provisions of the Bankruptcy Act to avoid questions under the fifth amendment takings clause); *Lorillard v. Pons,* (reading the Age Discrimination in Employment Act to permit jury trial on actions for lost wages rather than reach a seventh amendment challenge); *Tree Fruits* (permitting secondary consumer picketing under the National Labor Relations Act); *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (interpreting the National Labor Relations Act as not granting the National

Labor Relations Board jurisdiction over lay faculty members of church-operated schools).

Such concerns did not control in *Savage v. Commodity Futures Trading Commission,* 548 F.2d 192 (7th Cir.1977), a case presenting a strong analogy to the one before us. The Commodity Futures Trading Commission had denied plaintiff's application for registration as a "commodity trading advisor," pursuant to 7 U.S.C. §§ 6n, 12a (1976), because of his prior conviction for securities and mail fraud. Like its counterpart in the Advisers Act, the Commodity Futures Trading Commission Act defines an advisor to include one "who for compensation and profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities." 7 U.S.C. § 2 (1976). Prior to the enactment of the Act, the plaintiff had published a weekly subscription newsletter giving his views on the commodity market. He challenged the Commission's denial of his registration as a violation of his first amendment rights. The Seventh Circuit panel brushed aside the first amendment challenge, categorizing the speech as commercial and declaring that the first amendment "does not remove a business engaged in communication of information from general laws regulating business practices," 548 F.2d at 197. The court made reference to Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that adduced the securities laws as one example of the proposition that "the right to communicate information of public interest is not 'unconditional'." *Id.* at 150, 87 S.Ct. at 1989.

The *Savage* court did not have the benefit of the Supreme Court's subsequent commercial speech cases suggesting that

the commercial speech doctrine is limited to advertising. The cited observations of Justice Harlan in *Curtis Publishing* must be considered in context. The question in that case was not one of prior restraint, but rather of news media liability in damages for inaccurate and defamatory reporting. Federal securities regulation was referred to in a list that included mail fraud and common-law actions of deceit and misrepresentation. Justice Harlan demonstrated that the law countenanced the imposition of liability and sanctions on those who had disseminated to the public damagingly false information. He did not imply that in a business context the government may restrict in advance the public speech of certain individuals out of a fear that what they would say in the future might prove deceptive. The authority to impose blanket suppression through prior restraint on would-be publishers of impersonal market information thus has not, so far as we have been able to determine, been recognized by the Supreme Court.

The Advisers Act may readily accommodate the principle that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960) (footnote omitted). The narrower means provided for in the Act to protect the public against placing its confidence in investment publishers unworthy of its trust is detailed and particular disclosure. *Cf. Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299, 102 S.Ct. 434, 439, 70 L.Ed.2d 492 (1982) (instead of a limitation on campaign contributions which restrains first amendment

freedoms of association and expression "[t]he integrity of the political system will be adequately protected" by public disclosure of contributions).

1. *Denial of Registration to Publishers*

The Act is construed to require registration of publishers of impersonal investment material, but is not interpreted to empower the Commission to deny registration to such publishers, qua publishers, nor to revoke their registration previously granted. As the Second Circuit observed in *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1380 n. 13 (2d Cir.), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970), "even if a newspaper is engaged in commercial practices which may be regulated, the Act grants no authority for review or censorship by the Commission of investment advisory material prior to its publication."

Section 202(a)(11) of the Act, 15 U.S.C. § 80b-2(a)(11) (1976) combines in its definition both the personal and impersonal adviser. Nevertheless, the Act is of limited applicability to advisers and their associates as publishers of impersonal investment advice for general or subscription distribution in section 203(c)(2)(B), 15 U.S.C. § 80b-3(c)(2)(B), insofar as it speaks of denial of registration; the last sentence of section 203(c)(2), 15 U.S.C. § 80b-3(c)(2); section 203(e), 15 U.S.C. § 80b-3(e), insofar as it speaks of suspension or revocation of registration; and section 203(f), 15 U.S.C. § 80b-3(f), insofar as it speaks of suspension or bar from association with an investment adviser. These provisions may only be invoked for failure to make the required disclosures. When a publisher who has been denied registration or against whom sanctions have been invoked fully complies with the record, reporting and disclosure requirements under the Act, he must be allowed to register for the purpose of publishing and to publish.

The defendants, whose registration has been revoked by the SEC for all purposes on May 11, 1981, cannot be cited for or enjoined from a violation of the registration provisions of the Advisers Act insofar as their activities are limited to publishing. So long as the defendants stand ready to submit to registration and provide all information that is now or may in the future be properly required by the SEC pursuant to sections 203(c)(1) and 204 of the Advisers Act, 15 U.S.C. §§ 80b-3(c)(1), 80b-4 (1976), but are denied registration by the Commission, they may continue to publish their market newsletters and news services.

In the publisher's context, registration constitutes no more than a feature of the disclosure mechanism. Although section 203(c)(2) of the Act, 15 U.S.C. § 80b-3(c)(2) (1976), allows the Commission 45 days to make a determination on an application for registration, with an extension of up to 90 days if proceedings are held, this does not constitute an impermissible period of restraint. Unlike certain types of political speech where the timing of public dissemination may be of the essence, *cf. Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y.1980), the date on which an investment publisher begins to offer his services to the public is not critical. Provided the Commission uses the allowed time in good faith to expeditiously ascertain the completeness and accuracy of the proffered disclosure, the attendant delay is justified by the substantial public interest served by truthful and honest reporting by investment advisers. *See* L. Tribe, Constitutional Law 730-31 (1978).

2. *Failure to Reveal Denial of Registration and Convictions*

The SEC charges defendants with a violation of the anti-fraud provisions of the Advisers Act, section 206, 15 U.S.C. § 80b-6 (1976). The contention is that the defendants' solicitation and sale of investment advisory publications without disclosure to readers and potential readers of the SEC's May 11, 1981 order against Lowe and Lowe Management Corporation and Lowe's criminal convictions constituted fraud.

The SEC's authority to require of investment advisers on-going disclosure derives from section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976). This section does not authorize the SEC to prescribe ad hoc disclosure requirements. Section 204 explicitly provides that any record and report obligation imposed by the SEC must be prescribed by rule; disclosure requirements must be of general application. Because there is no rule presently in force that would require a subscription market letter publisher to disclose to its readers the past misconduct or criminality of its owners, employees or associates, the defendants cannot be found to have violated any reporting requirements. Advisers Act Rule 204-3, 17 C.F.R. § 275.204-3 (1982), which requires certain disclosure to advisory clients, conspicuously fails to require disclosure of Part I of Form ADV, containing a recital of any administrative or judicial determinations of misconduct against the adviser. It would be patently unfair to hold defendants accountable under the anti-fraud provisions of section 206 for failure to disclose when the reporting rules are silent on any such requirement and may even imply the absence of such a requirement.

Nothing presented to the court in this case suggests that narrowly drawn reasonable rules for divulgence in the publication itself of criminal activities or of deregistration of principals of a publisher would be invalid. The "fact that a demand for disclosure may have some deterrent effect upon speech does not automatically invalidate it." *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1380 (2d Cir.), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970). *See Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190 (1913) (validating legislation now contained in 39 U.S.C. § 3685 (1976), requiring a periodical publication having reduced rate mailing privileges to publish annually the identities of its owners, editors, publishers and creditors). *See also Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (ordinance requiring publicly distributed handbills to contain a printed identification of authorship not narrowly drawn to effect the declared aims, so that the Court was not required to reach the question of whether such a disclosure requirement could ever be constitutional); L. Tribe, Constitutional Law 798-99 (1978). *Cf. Electric Bond and Share Co. v. SEC*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938) (upholding the registration and disclosure provisions of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (1976)); *Oklahoma-Texas Trust v. SEC*, 100 F.2d 888 (10th Cir.1939) (ruling that Congress may require securities registration as a condition precedent to the use of the mails and the facilities of interstate commerce); *Buckley v. Valeo*, 424 U.S. 1, 60-85, 96 S.Ct. 612, 654-66, 46 L.Ed.2d 659 (1976) (approving the reporting and disclosure requirements of the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.* (1976)); *United States v. Harriss*, 347 U.S.

612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (upholding the reporting provisions of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 *et seq.* (1976), against first amendment challenge). The government has an added interest in publicly disseminated disclosure when speakers avail themselves of the mails as do investment advisory publishers. *See Lewis Publishing Co. v. Morgan, supra.* This interest is expressed on the face of section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976), which imposes record and reporting obligations on "[e]very investment adviser *who makes use of the mails* or of any means or instrumentality of interstate commerce." (Emphasis added.)

Conclusion

The Advisers Act requires registration of investment advisory publishers. It does not authorize denial of registration to these persons as publishers because of past misconduct so long as they make the disclosure provided for in the Act and rules. Because the defendants in this case were effectively denied registration as publishers, they will not be enjoined from publishing their newsletters and other impersonal services. The Commission's order of May 11, 1981 remains undisturbed insofar as it applies to any investment advisory activity other than the publication of impersonal investment advisory material.

The offer of defendants to their subscribers to provide current information by telephone goes beyond impersonal communication. It creates dangers of personal advice. The SEC may reasonably deny this right to publishers barred from giving personal advice.

Defendants did not violate the anti-fraud provisions of the Advisers Act by failing to disclose to their subscribers

Lowe's criminal convictions and the Commission's order of May 11, 1981 revoking the registration of Lowe Management Corporation and barring Lowe from association with any investment adviser. There presently exists no obligation under the securities laws and rules to make such disclosure.

The petition for a temporary and permanent injunction pursuant to section 209(e) of the Advisers Act, 15 U.S.C. § 80b-9(e) (1976), and the petition for an equitable order of disgorgement of monies received in the course of the business of impersonal investment advisory publication are denied. An injunction will issue denying defendants permission to give securities information to their subscribers or potential subscribers directly or indirectly by telephone, individual letter or in person.

So ordered.

§ 80b-2. Definitions

(a) When used in this subchapter, unless the context otherwise requires—

• • •

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

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§ 80b-3. Registration of investment advisers

Necessity of registration

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

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Procedure for registration; filing of application; effective date of registration; amendment of registration

(c)(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment advisor be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of

the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

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Censure, denial, or suspension of registration; notice and hearing

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and

in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, or

the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

Bar or suspension from association with investment adviser; notice and hearing

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (c) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

• • •

§ 80b-9. Enforcement of Subchapter

• • •

Action for injunction

(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criimnal proceedings under this subchapter.

MOTION FILED
JUN 22 1984

No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION AND LOWE STOCK CHART SERVICE, INC.,
Petitioners,

VS.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF OF FINANCIAL PUBLISHERS OF AMERICA AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Ralph C. Ferrara
(Counsel of Record)
James C. Goodale
Alan Charles Raul
DEBEVOISE & PLIMPTON
1777 F Street, N.W.
Washington, D.C. 20006
(202) 289-0100

Attorneys for Amicus Curiae
Financial Publishers of America

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MOTION FOR LEAVE TO FILE BRIEF OF FINANCIAL PUBLISHERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Financial Publishers of America, a nonprofit corporation recently formed as a trade association for publishers of financial and economic information (the "Association"), hereby respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in this case in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The Association has sought the consents of the parties to the filing of this brief; the respondent has granted its consent, but the petitioners, whose position is supported by the brief, have not.

The decision below would grant an injunction permitting the Securities and Exchange Commission to ban completely the publication of a newsletter containing economic and financial information discussing investment in securities. The interest of the Association arises from the fact that this case will determine the First Amendment rights of a publisher to publish financial information not claimed to be either misleading or unlawful.

The Association is particularly well situated to address the crucial constitutional issues of fundamental concern to financial publishers generally. The Association believes its broader perspective may assist this Court in determining whether the regulation and prior restraint challenged here reach beyond the censorship of the one individual involved in this litigation and entail consequences of immense public importance.

WHEREFORE, it is respectfully requested that the Court grant the Financial Publishers of America leave to file the accompanying brief as *amicus curiae* to support the petition for a writ of certiorari to the Court of Appeals for the Second Circuit.

Dated: Washington, D.C.
June 22, 1984

Respectfully submitted,

/s/ RALPH C. FERRARA

Ralph C. Ferrara
(Counsel of Record)
James C. Goodale
Alan Charles Raul
DEBEVOISE & PLIMPTON
1777 F Street, N.W.
Washington, D.C. 20006
(202) 289-0100

Attorneys for Amicus Curiae
Financial Publishers
of America

QUESTION PRESENTED

UNDER THE FIRST AMENDMENT, MAY A FINANCIAL PUBLISHER BE TOTALLY BANNED BY THE SECURITIES AND EXCHANGE COMMISSION FROM PUBLISHING TRUTHFUL FINANCIAL OR ECONOMIC INFORMATION REGARDING INVESTMENTS IN SECURITIES SOLELY BECAUSE OF THE PUBLISHER'S PRIOR CRIMINAL RECORD?

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SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF FINANCIAL PUBLISHERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS

The Financial Publishers of America (the "Association") is a nonprofit corporation that was recently organized under the laws of the District of Columbia to serve as a forum for publishers of books, magazines, newsletters and other media espousing a financial or economic theme. As an industry association, the Financial Publishers of America seeks to pro-

mote high standards of professionalism among its members as well as financial writers, generally.[1] Fulfilling another fundamental purpose of the Association, filing this brief is an important step in speaking out as a public advocate for the common interests of its members.

The central role of the financial publishing industry is to supply information about matters of great interest and significance to the investing public. Thus, preserving the constitutional right of any publisher to publish financial material that is neither misleading nor unlawful is the industry's most vital concern.

STATEMENT OF THE CASE

Amicus relies on the statement of the case presented by Petitioners. Petition at pp. 3-8. For purposes of this Brief, only the essential points as set forth in the Petition and decisions below are recapitulated here.

A. Background

Petitioners are publishers of a number of different investment newsletters which comment on the securities markets, taking into account short- and long-term financial forecasts and relevant trends, as well as consideration of the underlying economic and political factors that influence the value of investments. Subscribers pay a fee for the right to receive the information contained in Petitioners' publications.

While their newsletters will typically recommend that specific securities, or groups of securities, be purchased, sold or held, Petitioners themselves do not execute (or offer to execute) any transactions for their subscribers, whether based on such recommendations or otherwise. Petitioners do not, apparently,

[1] None of the Petitioners is, or has been, either an individual or corporate member of the Association. However, while the Association certainly does not condone Mr. Lowe's past conduct, his professional activity as the publisher of investment newsletters places him and his publications squarely in the community whose interests the Association seeks to serve. Defending freedom of the press is essential in a case such as this even though the victim here, like many other claimants under the First Amendment, may be less than pure.

have any personal relationships with their subscribers, nor do they have any specific knowledge of their subscribers' holdings or investment portfolios. Moreover, Petitioners have absolutely no delegated authority and can exercise no judgment or other discretion with respect to their subscribers' actual trading accounts.

Critically, the case against Petitioners does not involve accusations of "scalping,"[2] or other misuse or distortion of published information. The Securities and Exchange Commission ("SEC") does not allege that Petitioners took any improper advantage of information published in their newsletters. In fact, the district court judge, Chief Judge Weinstein, specifically stated that Petitioners' readers were pleased with the investment news provided in the publications. *SEC v. Lowe*, 556 F. Supp. 1359, 1361 (E.D.N.Y. 1983) ("Subscribers to these services called as witnesses by the SEC generally were satisfied with what they received."), *rev'd.* 725 F.2d 892 (2d Cir. 1984), *petition for cert. filed* (U.S. May 16, 1984) (No. 83-1911).

Although Petitioners published their newsletters and communicated financial information apparently without fault, Lowe's conduct in certain other respects was undeniably improper. Specifically, an administrative law judge found that Lowe had misappropriated client funds when he was acting as a personal investment adviser and had failed to amend his corporation's investment adviser registration statement promptly to disclose his criminal record. Consequently, the SEC ordered that Mr. Lowe be banned from associating with any investment adviser and simultaneously revoked his registration under section 203(e) and (f) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. § 80b-3(e), (f).

Having had his investment adviser's registration revoked, Lowe stopped handling any client funds or accounts. He ceased functioning as an investment adviser in the traditional sense

[2] "Scalping" is the unlawful practice whereby an investment adviser recommends a security in order to profit personally from the short-term price effect induced by the recommendation itself. *See, generally, SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

and limited his activities to the publication of investment newsletters. Nevertheless, the SEC insisted that Lowe could not even continue publishing the newsletters without being registered because any such publication technically constituted engaging in the business of an investment adviser. Thus, even after his hands were effectively tied, the SEC sought an injunction to silence Lowe's publications forever.

B. Proceedings Below

Four distinguished jurists have written opinions disagreeing on the important constitutional and regulatory issues now before this Court. Chief Judge Weinstein of the Eastern District of New York decided against granting the SEC's request for an injunction. Finding that "[t]he authority to impose blanket suppression through prior restraint on would-be publishers of impersonal market information . . . has not . . . been recognized by the Supreme Court," 556 F. Supp. at 1369, the Chief Judge refused to enjoin the very publication of Petitioners' newsletters without proof they contained fraudulent speech or misleading information. Chief Judge Weinstein did, however, enjoin Lowe from acting as a personal investment adviser and giving clients advice over a telephone hotline.

Splitting two to one, the Court of Appeals for the Second Circuit reversed the lower court with all three judges on the panel writing separate opinions. Judge Brieant argued in dissent that "the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers." *SEC v. Lowe*, 725 F.2d at 908 (Brieant, J., dissenting). Thus, he concluded that a publisher, even a financial publisher, was entitled to freedom from prior restraint under the First Amendment unless his speech was unprotected by virtue of its deceptive or misleading content.

SUMMARY OF ARGUMENT

The injunction ordered by the Court of Appeals, reversing the District Court, is a clear-cut prior restraint banning the publication of financial information that is neither untruthful nor misleading. The SEC may not under the First Amendment expand its regulatory authority to allow total censorship based solely on the prior criminal record of a financial publisher.

The injunction violates the First Amendment because it utterly denies free speech and freedom of the press without even pretending to balance the Constitution against investor protection.

The Advisers Act, moreover, does not require the SEC to censor Petitioners. The injunction to that effect is unnecessary not only because the censored information is not deceptive, but also because the SEC could instead require full disclosure of the publisher's criminal record to protect investors. Thus, the prior restraint granted to the SEC by the Court of Appeals is clearly more extensive than necessary to serve the public interest; the injunction must be overturned so that Petitioners' constitutional rights can be reconciled with the purposes of the Act.

ARGUMENT

I. THE SECURITIES LAWS DO NOT JUSTIFY THE SEC'S ATTEMPTS TO EXPAND ITS REGULATORY AUTHORITY BY INFRINGING CONSTITUTIONAL RIGHTS OR INTERFERING WITH OTHER ACTIVITIES

Appropriately, the SEC has always administered the laws under its charge with aggressive zeal. For its vigilance, the SEC has earned a well-deserved reputation as a regulatory agency of special competence. But, from time to time, such eager pursuit of its objectives has carried the SEC across the proper boundaries of its mandate and into conflict with competing interests. Accordingly, this Court has more than once recognized the need to balance the securities laws, and the SEC's salutary enforce-

ment thereof, with other legal norms. In *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551 (1979), Justice Powell acknowledged that

> "[o]n a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts. *See SEC v. Sloan*, 436 U.S. 103, 117-119, 98 S. Ct. 1702, 1711-1712, 56 L.Ed.2d 148 (1978); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27, 97 S.Ct. 926, 949, 51 L.Ed.2d 124 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214, 96 S.Ct. 1375, 1390-1391, 47 L.Ed.2d 668 (1976); *Forman*, 421 U.S., at 858 n.25, 95 S.Ct., at 2063; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 759 n.4, 95 S.Ct. 1917, 1936, 44 L.Ed.2d 539 (1975) (POWELL, J., concurring); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 425-427, 92 S.Ct. 596, 600-602, 30 L.Ed.2d 575 (1972)."

Id. at 566 n.20.

The Court declined in *Daniel* to extend the securities laws where doing so would compete with existing "comprehensive legislation" (*i.e.*, the national labor laws) also touching the same issue. *Id.* at 569. Similarly, in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), this Court refused to permit regulation under the securities laws to override "established state policies of corporate regulation." *Id.* at 479.

The two brief examples discussed above suggest that it is utterly inconceivable that the same securities laws that have yielded to overlapping federal labor law and state corporation law should not also make room for the First Amendment. In the words of Judge Danaher, such a result would "ensconce 'administrative absolutism' at its unreachable zenith." *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1385 (2d Cir.) (Danaher, J., concurring in remand), *cert. denied*, 398 U.S. 958 (1970). *See also Dirks v. SEC*, 103 S. Ct. 3255, 3266 (1983) (some limiting principle must apply to SEC regulation).

II. REGULATION OF INVESTMENT ADVISERS MUST RESPECT THE FIRST AMENDMENT SO AS TO AVOID AN ABSOLUTE DENIAL OF FREEDOM OF THE PRESS THAT WOULD ENTIRELY DEPRIVE A FINANCIAL PUBLISHER OF HIS RIGHT TO SPEAK

A. The Injunction Granted to the SEC Permits Total Censorship and Must Be Overturned Under the First Amendment.

Forcing Lowe to stop the press and terminate his publications is a textbook case of absolute prior restraint. It comes before the Court "bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Although the opinions below tread heavily on the doctrine of "commercial speech," *amicus* respectfully submits that the Court need not parse that distinction to decide this case.[3] *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Whether investment newsletters are merely "commercial speech" entitled to qualified First Amendment protection, or fully protected speech, Petitioners' rights under the First Amendment have in this case been regulated out of existence entirely.

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[3] *Amicus* would contend that Petitioners' speech is not "commercial" because, as articulated by Chief Judge Weinstein, "the combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters places them outside the rubric of commercial speech . . . ." *SEC v. Lowe*, 556 F. Supp. at 1367. *See also SEC v. Lowe*, 725 F.2d at 906 (Brieant, J., dissenting) (after *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983), commercial speech that goes beyond mere advertising and implicates "substantial individual and societal interests" is entitled to full First Amendment protection from prior restraint).

The Court of Appeals' injunction provides the SEC with the power to impose a total ban on Petitioners' expression *per se*.[4] This despite the fact that *Lowe is a publisher and Petitioners' publications are free from false, deceptive or misleading speech.* Under these circumstances, such blanket suppression of Petitioners' lawful speech plainly violates the First Amendment and cannot stand. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

B. The Advisers Act Need Not Be Read to Abridge Freedoms Guaranteed by the First Amendment

As Chief Judge Weinstein succinctly stated, the "[Advisers] Act should be construed to steer clear of possible infringements on freedom of the press." 556 F. Supp. at 1368. This wise guidance is constitutionally required and perfectly feasible.

1. The Advisers Act can be read flexibly to give effect to Petitioners' constitutional rights.

As discussed earlier, there is ample precedent and good reason for construing the securities laws to accommodate other applicable legal norms. Similarly, reading the Advisers Act technically to compel a clash with the First Amendment can be easily avoided here by following this Court's guideline, and the SEC's enthusiastic refrain, that "Congress intended the Investment Advisers Act of 1940 to be construed . . . not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

To that end, Congress gave the SEC the authority to exempt any class of persons from any provisions of the Advisers

[4] In the Second Circuit's majority opinion, Judge Oakes allowed as how Lowe was censored only with respect to the publication of his newsletters and nothing more. Lowe was "free" to exercise his First Amendment rights so long as he would choose to talk on different topics or speak through other media. *SEC v. Lowe*, 725 F.2d at 902. Such procrustean compromise with the basic guarantees of speech and press simply does not withstand objective analysis.

Act when required "in the public interest." Advisers Act, § 206A, 15 U.S.C. § 80b-6a. Surely, it is *in the public interest* to contain the exercise of the SEC's regulatory authority in places where it "might collide with the guarantees of the First Amendment." *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 63 (1964).

The *Wall Street Transcript* decision cited prominently by the SEC in this litigation is not to the contrary. *SEC v. Wall Street Transcript Corp., supra*, 422 F.2d 1371. That case involved an SEC subpoena enforcement action where a financial publication contested access to its records. The publication fought the subpoena on the theory that, as a member of the press, the First Amendment precluded any regulation of its activities. The Court of Appeals ordered enforcement of the SEC's subpoena there to determine whether the publication was in fact a vehicle for distributing investment advice that might be subject to the agency's proper regulation of investment advisers.

Significantly, the court recognized the clear constitutional limits of the SEC's regulatory authority. It crisply distinguished investigation of a publication's activities, on the one hand, and pulling the plug, on the other. "[E]ven if a newspaper is engaging in commercial practices which may be regulated, *the [Advisers] Act grants no authority for review or censorship by the Commission* of investment advisory material *prior to its publication.*" *Id.* at 1380 n.13 (emphasis added).

Unlike the *Wall Street Transcript*, Petitioners here had actually registered under the Advisers Act and were evidently not seeking to evade regulation by the SEC while continuing to publish their newsletters. As the decision in *Wall Street Transcript* makes plain, there is a critical legal distinction between the disclosure requirements under the Advisers Act and the total censorship requested by the SEC.

2. The fundamental purpose of the Advisers Act is disclosure not censorship.

Like the securities laws generally, the "core of the [Advisers] Act" is *disclosure* of fairly detailed information by

investment advisers regarding their qualifications. *SEC v. Blavin*, 557 F. Supp. 1304, 1309 (E.D. Mich. 1983) (citing *Wall Street Transcript, supra*, 422 F.2d at 1376). "[P]rotecting investors through the prophylaxis of disclosure" is the principal purpose of the Advisers Act. *SEC v. Capital Gains Research Bureau, Inc., supra*, 375 U.S. at 200.[5] Thus, the basic thrust of both the First Amendment and the Advisers Act is the same: to preserve the full and free flow of information to all concerned.

In *Blavin*, the Act's insistence on disclosure and other formalities of regulation was approved specifically because it would not have the effect of the injunction before this Court now.

> "[I]n contrast to the situation in *Lowe*, the SEC is seeking to force Blavin to comply with the registration and disclosure provisions of the Act, and to prevent him from recommending stock in which he has a conflict of interest without disclosing that conflict. *It is true that the SEC has no authority to review, censor, or in any way restrain investment advisory material prior to publication. If Blavin fully complies with the recording, reporting, and disclosure requirements of the Act, he must be allowed to register for the purpose of publishing and be allowed to publish. The First Amendment protects this right. He cannot be cited or enjoined from a violation of the registration provisions of the Advisers Act insofar as his activities are limited to publishing.*"

SEC v. Blavin, supra, 557 F. Supp. at 1310 (emphasis added).[6] Chief Judge Weinstein denied the SEC's request for an injunction in this case using almost precisely the same words:

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[5] To be sure, *Capital Gains* noted that the Advisers Act did exact certain fiduciary standards. However, the Court in *Capital Gains* addressed its decision to the problem of *nondisclosure—i.e.*, the failure of an investment adviser to disclose its "scalping" (as a material fact) and the inherent financial conflict of interest. 375 U.S. at 196-201.

[6] While the majority opinion in the Second Circuit's *Lowe* decision suggested that the SEC's censorship of Petitioners was permissible licensing of professionals, relevant authorities indicate that full disclosure, open channels of communication and the free flow of information are preferable to shutting

footnote continued

> "When a publisher who has been denied registration or against whom sanctions have been invoked fully complies with the record, reporting and disclosure requirements under the Act, *he must be allowed to register for the purpose of publishing and to publish.*"

SEC v. Lowe, 556 F. Supp. at 1369 (emphasis added).

C. The SEC's Prior Restraint Against Petitioners Is Not Necessary to Protect Investors Under the Advisers Act and Is More Restrictive Than Permitted by the First Amendment

1. Full disclosure of criminal violations will protect investors.

As Chief Judge Weinstein indicated, the SEC may prescribe (by rule) that investment advisers be required to disclose publicly their criminal convictions. *SEC v. Lowe*, 556 F. Supp. at 1370 (discussing authority of SEC under section 204 of the Advisers Act, 15 U.S.C. § 80b-4). Specifically, in Advisers Act Rule 204-3, 17 C.F.R. § 275.204-3, the SEC could seek to require such disclosure to advisory clients, but has not so far chosen to do so.

Disclosure of Lowe's criminal convictions would obviously permit his subscribers to evaluate the validity of his judgment and the worth of his publications. This piece of information may be all the notice and advance protection they need, and probably want. Without face to face contact, Lowe has no "undue influence" over his subscribers,[7] and his publishing

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footnote continues

off regulated speech entirely. *Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n. 32, (1978); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976); *United States v. Harriss*, 347 U.S. 612, 625-26 (1954). Even potentially misleading information cannot be banned completely if it can be presented with an explanation or disclaimer. *See In re R.M.J.*, 455 U.S. 191 (1982).

[7] *Cf. Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 449, 455 (1978) (distinguishing a lawyer's solicitations by personal visits as opposed to solicitations by print advertising; the former "breeds undue influence" while the latter does not).

activities do not entail any control over his subscribers' trading in securities, or over any of their invested funds.[8]

2. A total ban on publications is a lopsided remedy that protects investors more restrictively than the First Amendment allows.

As a general principle, this Court has left no doubt that when confronting the dangers of suppression and the dangers of freely flowing information, the First Amendment choice is clear. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 770. Furthermore, the Court's decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975), held that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* at 826 (also noting "more serious First Amendment overtones" of applying regulatory statute to newspaper editor).

When applying the First Amendment to the public interest in regulation under the Advisers Act, a court would have to strike down an absolute prior restraint on truthful speech if it is any "more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 566 (1980).

Here, the SEC has obtained a prior restraint injunction to champion presumed investor interests. But precisely from what risks do Petitioners' subscribers need to be protected that could outweigh the requirements of the First Amendment? Lowe manages no money for them; he has no access to their trading accounts or to the private details of their portfolios; and, not only has he never been accused of "scalping," but his publications appear to be considered truthful and, perhaps, useful.

Given the presumed regulatory power to prescribe disclosure, and the other real constraints on Lowe's influence discussed above, it is plain that the SEC has unconstitutionally

[8] It should again be emphasized that what Petitioners seek from the SEC is freedom from total censorship. Accordingly, the "impersonal adviser" concept of Chief Judge Weinstein is useful to analyze the First Amendment issues, and is consistent with *Ohralik,* but would not here require that the Court strike down the statute's regulatory scheme.

ignored Petitioners' right of free speech as well as the public's right to a free press (including the right of willing listeners to hear out willing speakers). Thus, the SEC's most restrictive injunction must be lifted in exchange for a remedy that is "no broader than reasonably necessary to prevent the deception." *In re R.M.J., supra,* 455 U.S. at 203. And, combining the words of two of the four learned judges who considered this case below,

> "for what is all this great effort? I [Judge Brieant] agree with Chief Judge Weinstein below that '*the censorship that the SEC would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public,*' (556 F.Supp. at 1366) and therefore a balancing of the equities requires that no injunction issue."

SEC v. Lowe, supra, 725 F.2d at 910 (Brieant, J., dissenting) (emphasis added).

Total, one hundred percent and absolute protection of investors is not feasible in any event; and, in light of the sacrifice of fundamental constitutional rights, it is almost certainly not socially desirable. The marginal loss of assured protection, if any, is a relatively small cost for preservation of the First Amendment.

If Lowe ever does change his current tack and begins publishing questionable information in his publications, or otherwise jeopardizes his subscribers, the SEC has the ammunition to step in and end those potential abuses. Instead, the SEC has chosen to jump prematurely to restrain Petitioners before any allegations or suspicions of deception have been charged. Such categorical action at this time is unreasonably broad, unduly restrictive, and more extensive than necessary to protect the public interest; most important, it is, therefore, clearly unconstitutional.

CONCLUSION

For the foregoing reasons, the Financial Publishers of America respectfully requests that this Court grant certiorari to correct the violation of the First Amendment that will result if the injunction ordered by the Court of Appeals is not reversed.

Dated: Washington, D.C.
June 22, 1984

Respectfully submitted,

/s/ RALPH C. FERRARA

Ralph C. Ferrara
(Counsel of Record)
James C. Goodale
Alan Charles Raul
DEBEVOISE & PLIMPTON
1777 F Street, N.W.
Washington, D.C. 20006
(202) 289-0100

Attorneys for Amicus Curiae
Financial Publishers
of America

I, Ralph C. Ferrara, a member of the Bar of this Court, do hereby certify that I caused three copies each of the annexed Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* to be served by mail, first-class postage prepaid, this 22nd day of June 1984, upon the following counsel:

Michael E. Schoeman
Schoeman, Marsh, Updike
& Welt
60 East 42nd Street
New York, New York 10165
(212) 661-5030

Counsel for Petitioners

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2201

Counsel for Respondent

/s/ RALPH C. FERRARA

Ralph C. Ferrara

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 83-1911

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER L. LOWE, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ALAN ROSENBLAT
Assistant General Counsel

DAVID A. SIRIGNANO
Assistant General Counsel

GERARD S. CITERA
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Amendment renders invalid the authority granted the Securities and Exchange Commission by the Investment Advisers Act of 1940 to deny or revoke the registration of a publisher of an investment advisory service on the basis of prior criminal conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 725 F.2d 892. The opinion of the district court (Pet. App. A41-A67) is reported at 556 F. Supp. 1359.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1984. A petition for rehearing was denied on February 22, 1984. The petition for a writ of certiorari was filed on May 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Christopher L. Lowe is the president of three corporations — petitioners Lowe Management Corporation, Lowe Publishing Corporation, and Lowe Stock Chart Service, Inc. — through which he has published and distributed two subscription investment advisory services and has solicited subscriptions for a third (Pet. App. A3, A9). Between March 29, 1974, and May 11, 1981, Lowe Management was registered with the Securities and Exchange Commission as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act of 1940 (the Act), 15 U.S.C. 80b-3(c) (Pet. App. A3).

In 1977, Lowe was convicted of two New York misdemeanors relating to his investment advisory business — defrauding an advisory client and failing to register as an investment adviser in New York State (Pet. App. A3). In 1978, Lowe was convicted of two New York felonies — tampering with physical evidence in a state criminal proceeding arising out of an advisory client's complaint and grand larceny involving fraudulent checks (*ibid.*; C.A. App. 9-10, 124-125). As a result of these convictions, the Commission instituted an administrative disciplinary proceeding under Sections 203(e) and (f) of the Act, 15 U.S.C. 80b-3(e) and (f), against Lowe and Lowe Management (Pet. App. A4). In that proceeding, the Commission found that Lowe willfully aided and abetted violations by Lowe Management of the antifraud and reporting provisions of the Act, including misappropriation of an advisory client's funds (Pet. App. A4).[1] The Commission also invoked the

[1] *In re Lowe Management Corp.*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 82,873 (May 11, 1981).

provisions of Sections 203(e) and (f) that made certain of Lowe's New York convictions a separate basis for administrative sanctions.[2]

In assessing what sanctions were appropriate in the public interest, the Commission found that Lowe's conduct "could hardly be more serious" and reflected a "callous disregard" for the high fiduciary standards required of an investment adviser (Pet. App. A4). Accordingly, the Commission issued an order on May 11, 1981, revoking the registration of Lowe Management as an investment adviser and barring Lowe from association with any investment adviser (*ibid.*). Neither Lowe nor Lowe Management sought judicial review of the Commission's order.[3]

Despite the Commission's order, Lowe thereafter published and distributed through his corporations two investment advisory services — the *Lowe Investment and Financial Letter* (the *Lowe Letter*) and the *Lowe Stock Advisory*. In addition, Lowe solicited subscriptions for a third service, the *Lowe Stock Chart Service*, and offered a recorded telephone "hotline" service said to provide "up-to-the-minute advice" on the market. Pet. App. A5.

The *Lowe Letter* consists of predictions of general trends and developments in securities and other markets, followed by advice about specific securities and other investments (Pet. App. A5-A6; C.A. App. 138-189). The *Lowe Stock Advisory* typically contains a brief introductory examination of general market trends followed by specific purchase, sale and hold recommendations, particularly for low-priced stocks (Pet. App. A6; C.A. App. 192-201). The *Lowe Stock*

[2] *In re Lowe Management Corp.*, *supra*.

[3] Subsequently, Lowe pleaded guilty to two charges under New Jersey law of theft by deception in the third degree, for fraudulently misrepresenting that worthless checks were good and negotiable (Pet. App. A5).

Chart Service has solicited subscriptions, distributing sample charts that analyze the trading patterns of selected securities and provide information concerning the projected future earnings of corporate issuers (C.A. App. 202-209).

2. The Commission brought the present action in the United States District Court for the Eastern District of New York, seeking an order enjoining Lowe and his three corporations from providing investment advice in violation of the Act's registration provisions, enforcing the Commission's 1981 order, and directing disgorgement of subscription monies received (Pet. App. A45).[4] The district court recognized that, in light of Lowe's past criminal conduct, "[t]he SEC's lack of confidence in Lowe is not without basis," but nevertheless refused to enjoin publication of the advisory letters (*id.* at A42). The court reasoned that a construction of the Act that would authorize the Commission to deny or revoke the registration of an advisory publisher for past misconduct would constitute an improper prior restraint in violation of the First Amendment (*id.* at A54-A55). The court therefore construed the Act as limiting the Commission's authority to revoke an adviser's registration to those advisers who provide their services in person, and not through publication (*id.* at A52). Accordingly, the court denied the Commission's request for an injunction against publication of investment advice, but granted a limited injunction prohibiting petitioners from rendering personal investment advice (*id.* at A67).[5]

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[4]The Commission also sought to enjoin violations of the antifraud provisions of Section 206 of the Act, 15 U.S.C. 80b-6, arising from Lowe's failure to disclose his New Jersey convictions and the sanctions that had been imposed by the Commission. The court of appeals did not address that aspect of the case, and it is not before this Court.

[5]The court also enjoined petitioners from providing their advice by individual letter or recorded telephone "hotline" service (Pet. App. A67).

3. The court of appeals reversed the district court's denial of an injunction against publication, holding that the Commission's authority under the Act to revoke the registration of investment advisers extends to publishers of investment advisory services and that this statutory authority does not violate the First Amendment (Pet. App. A9).[6]

The court of appeals upheld the Commission's regulation of investment advisory publishers on two independent grounds. The court first held that the challenged provisions constitute valid regulation of commercial activity. Citing *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978), in which this Court pointed out that government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," the court concluded that "the provisions of the Investment Advisers Act at issue here are precisely the kind of regulation of commercial activity permissible under the First Amendment" (Pet. App. A15). The court considered the registration of advisory publishers to fall within the government's authority to license professionals and noted that "denial of a professional license for criminal conduct has been a traditional, and perhaps necessary, aspect of this type of regulation" (*id.* at A18-A19).

The court of appeals concluded alternatively that the registration of investment advisers is a valid restriction on commercial speech (Pet. App. A17). The court reasoned that the concept of commercial speech is not limited to advertising and is broad enough to encompass Lowe's publications (*ibid.*). Relying on *Friedman* v. *Rogers*, 440 U.S. 1, 15 (1979), the court concluded that "the potential for

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[6]District Judge Brieant, sitting by designation, dissented on grounds similar to those stated by the district court (Pet. App. A23-A39). Judge Van Graafeiland joined Judge Oakes' majority opinion, and filed a concurrence (*id.* at A20-A22).

deception permits government to ban potentially deceptive commercial speech," and that, "[i]n light of Lowe's history of deceptive, criminal conduct as an investment adviser, his publications may fairly be characterized as potentially deceptive commercial speech" that may properly be banned (Pet. App. A19).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Only one other court of appeals has addressed the constitutional issue in this case. In a closely analogous situation, the Seventh Circuit in *Savage* v. *Commodity Futures Trading Commission,* 548 F.2d 192 (1977), considered a First Amendment challenge to the provisions of the Commodity Exchange Act that allowed the CFTC to deny an application for registration as a commodity advisory publisher on the basis of prior convictions for mail and securities fraud. The court rejected the constitutional challenge on essentially the same grounds as the court of appeals in the present case, holding that the publication of a newsletter was commercial speech and that the First Amendment does not except a business engaged in the communication of information from the regulation of its business practices. *Id.* at 197. In *SEC* v. *Suter,* No. 83-1452 (Apr. 13, 1984), the Seventh Circuit recently reaffirmed *Savage* in a case involving the Investment Advisers Act of 1940, holding that a securities advisory publication was commercial speech not subject to full First Amendment protection. The court upheld an injunction that required the publisher to submit to the Commission copies of all his advisory

publications simultaneously with their distribution to the public (slip op. 2).[7]

2. The provisions of the Investment Advisers Act of 1940 that allow the Commission to revoke the registration of an investment adviser for prior criminal conduct are valid under the First Amendment as permissible regulation both of commercial activity and of commercial speech.

a. Providing investment advice is commercial activity "in which speech is an essential but subordinate component." *Ohralik* v. *Ohio State Bar Association,* 436 U.S. at 457. In *Ohralik,* this Court stated that the government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity" (*id.* at 456) and pointed to

> [n]umerous examples * * * of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (CA 2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

Ibid. Speech related to commercial activity is not afforded any special protection merely because the speaker chooses to publish it, rather than to communicate it in person. It is

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[7] Another proceeding is pending before the Seventh Circuit involving the same publisher. There, the First Amendment question is raised in the context of revocation of the adviser's registration. *Suter* v. *SEC,* No. 83-3011.

firmly established that a "business 'is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws * * *.'" *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 150 (1967) (quoting *Associated Press* v. *NLRB,* 301 U.S. 103, 132, 133 (1937)).

This Court has consistently recognized that licensing of the professions clearly falls within the scope of legitimate government regulation of commercial activity.[8] *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975). In *Ohralik, supra,* for example, the Court affirmed an order suspending an attorney indefinitely from the practice of law despite his First Amendment challenge, stating that the government "bears a special responsibility for maintaining standards among members of the licensed professions" (436 U.S. at 460).

The government's interest in regulating the professions extends to investment advisers, whether they provide individualized advice or advise their clients through publications.[9] The investment advisory profession is "an occupation which can cause havoc unless engaged in by those with

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[8]The regulation of Lowe's commercial advisory business does not restrain him from engaging in other activities. Petitioners do not raise before this Court the argument, properly rejected by the court of appeals (Pet. App. A13), that Lowe's publications come within the "bona fide newspaper" exception to the Act (Section 202(a)(11)(D), 15 U.S.C. 80b-2(a)(11)(D)).

[9]Petitioners' argument (Pet. 11-12) that the statutory exemption from regulation for "bona fide newspaper[s]" and certain other publications (Section 202(a)(11)(D), 15 U.S.C. 80b-2(a)(11)(D)) unconstitutionally discriminates against investment advisory publications plainly lacks merit. As the court of appeals stated (Pet. App. A15-A16 n.5), Lowe's publications constitute commercial activity that is properly distinguished from the type of speech exempted by Section 202(a)(11)(D). See *SEC* v. *Wall Street Transcript Corp.,* 422 F.2d 1371, 1378-1379 (2d Cir.), cert. denied, 398 U.S. 958 (1970). If regulation of investment

appropriate background and standards." *Marketlines, Inc.* v. *SEC,* 384 F.2d 264, 267 (2d Cir. 1967), cert. denied, 390 U.S. 947 (1968) (affirming revocation of an advisory publisher's registration). Congress, in studying the investment advisory profession prior to passage of the Act, found that the public interest requires that investment advisers be persons with high ethical standards, since opportunities for fraud and deception abound in the profession.[10] National regulation of investment advisory *publishers,* who were expressly included by Congress under the statutory definition of investment advisers,[11] was deemed necessary because of "their potential influence on security markets and the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors * * *."[12] Congress recognized that investment advisory publishers were "open to suspicion of willingly lending themselves to the use of stock market promoters and manipulators who seek to influence the course of security prices through the use of propaganda."[13]

In *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 181 (1963), this Court described the abusive practice of "scalping." In that case, a registered investment adviser purchased securities prior to recommending them to his clients in a newsletter, and then immediately sold upon the

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advice is otherwise proper, it cannot be considered constitutionally infirm simply because publications as to which there is little "likelihood that the wrongdoing which the Act was designed to prevent has occurred" (422 F.2d at 1377 (footnote omitted)) are excepted from such regulation.

[10]*Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 76th Cong., 3d Sess. 1008 (1940) [hereinafter *Senate Hearing*].

[11]See Section 202(a)(11) of the Act, 15 U.S.C. 80b-2(a)(11).

[12]S. Rep. 1775, 76th Cong., 3d Sess. 21 (1940).

[13]*Senate Hearing* 1008.

rise in market price following the recommendation. The Court thoroughly reviewed the legislative history of the Act and found that Congress intended to subject publishers of investment advisory services to regulation, and to recognize under federal law the fiduciary relationship that exists between investment advisory publishers and their clients. *Id.* at 187 n.15, 191, 194. This fiduciary relationship in itself provides the government with a substantial interest in protecting investors by regulation of the activities of investment advisory publishers. See, *e.g., Ohralik,* 436 U.S. at 460-461; *Halsted* v. *SEC,* 182 F.2d 660, 668 (D.C. Cir.), cert. denied, 340 U.S. 834 (1950).[14]

b. The Act's regulation of investment advisory publications is also proper because such publications are entitled to only the limited First Amendment protection accorded "commercial speech." The court of appeals correctly concluded that the commercial speech doctrine is broad enough to include the Lowe publications (Pet. App. A17). Although this Court's commercial speech cases have dealt primarily with restrictions on advertising, they do not require that the

[14]Petitioners argue (Pet. 8-9) that the Act's regulation is excessive because the denial or revocation of registration constitutes a "prior restraint" on all future publication. But while barring persons from practicing a profession on the ground of misconduct may be characterized as a prior restraint on speech (*e.g.,* licensing of lawyers and teachers), revocation of a professional license, as noted by the court of appeals, is a necessary and traditional means of protecting the public from persons who are unfit to engage in the profession (Pet. App. A18-A19). Without the authority to deny or revoke an adviser's registration, the Commission would have no adequate means of protecting the public from persons who, like Lowe, have demonstrated their unfitness to engage in a profession involving fiduciary relationships; the Commission would be relegated to seeking sanctions after the injurious conduct had occurred while the individual is permitted to continue giving advice. If publishers of investment advice can properly be subjected to registration requirements, no purpose would be served by denying the courts the authority to issue an injunction that prohibits publication of investment advice by an adviser who is not registered.

commercial speech doctrine be limited to advertising.[15] See generally *Bolger* v. *Youngs Drug Products Corp.,* No. 81-1590 (June 24, 1983), slip op. 6-7 & n.14; *Friedman* v. *Rogers,* 440 U.S. 1, 10 n.9 (1979); *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 363 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761 (1976).

The rationale used by this Court for permitting diminished First Amendment protection for commercial speech fully supports affording Lowe's publications the same level of diminished First Amendment protection. Commercial speech derives its constitutional value solely because of the role it performs in our free enterprise economy: "[T]he allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Virginia Pharmacy,* 425 U.S. at 765. See also *Bates,* 433 U.S. at 364. Investment advisory publications serve the same societal purposes as the communications at issue in this Court's commercial speech cases. Rather than providing a general forum for social, political or religious information, they seek to advise clients on the relative merits of various investments and as

[15]One court of appeals has suggested in dictum that commercial speech is confined to advertising (see *Ad World, Inc.* v. *Township of Doylestown,* 672 F.2d 1136, 1140 (3d Cir.), cert. denied, 456 U.S. 975 (1982)). The court in *Ad World* was reviewing regulation of a newspaper that contained both editorials and advertising. Its decision was based on the undeniably noncommercial content of the editorials (672 F.2d at 1139-1140), not on a limitation of commercial speech to advertising. The commercial speech rationale in the instant case, moreover, was an alternate ground of decision (Pet. App. A17). Thus, there is no conflict requiring resolution by this Court. Moreover, the dictum in *Ad World* fails to take into account the unquestionably proper regulation of speech in a wide variety of commerical contexts apart from advertising, such as misrepresentation and labeling. See, *e.g., Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427 (1919).

such merely recommend commercial transactions. The purpose of investment advice such as that at issue here "is strictly business" (*Friedman* v. *Rogers*, 440 U.S. at 11), and the advisory publications do no more than "inform private economic decisions" (*Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)). As such, they are entitled to less First Amendment protection than other constitutionally safeguarded forms of expression. *Bolger* v. *Youngs Drug Products Corp.*, slip op. 4-5; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 562-563 (1980); *Virginia Pharmacy*, 425 U.S. at 771-772 n.24.[16] As this Court noted in *Ohralik*, 436 U.S. at 456:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values * * *.[17]

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[16]Petitioners' publications therefore differ significantly from the types of speech at issue in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978) (lobbying on tax legislation), and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940) (peaceful labor picketing), relied upon by petitioners (Pet. 9).

[17]Petitioners' reliance (Pet. 10) on *Bose Corp.* v. *Consumers Union*, No. 82-1246 (Apr. 30, 1984), is misplaced. *Bose* addressed only the proper standard of appellate review of an "actual malice" determination where the libel rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), was applied. The Court in *Bose* did not address the reach of the First Amendment in licensing or commercial contexts, or even in the product disparagement situation raised in that case (slip op. 6 n.8).

Petitioners also argue (Pet. 11) that even if the Lowe advisory publications are commercial speech, the court of appeals should not have

Regulation of published investment advice, including revocation of an adviser's registration, is proper under the commercial speech doctrine because it is no more extensive than is necessary to achieve the government's substantial interest in maintaining the standards of the investment advisory profession in order to protect investors. See *Central Hudson*, 447 U.S. at 565-566; *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). See also *Members of the City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 17-20; pages 8-10, *supra*.

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upheld a ban on their publication because the Commission failed to show that any investment information in them was actually deceptive. But, as Congress found in studying the investment advisory profession, when persons, like Lowe, of questionable honesty and integrity publish investment advice, their publications are potentially deceptive (*Senate Report* 21). This potential for deception provides an ample basis for regulating the publications as commercial speech. See *Ohralik*, 436 U.S. at 464-465 (upholding ban on speech that was "conducive" to deception and overreaching as a "prophylatic measure[] whose objective is the prevention of harm before it occurs"); *Friedman* v. *Rogers*, 440 U.S. at 12-13, 15 (approving total ban by Texas on optometrists' use of trade names because such use was conducive to deception and manipulation, thus leading to "a significant *possibility* that trade names will be used to mislead the public" (emphasis added)). See also pages 9-10, *supra*; Pet. App. A18-A19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ALAN ROSENBLAT
Assistant General Counsel

DAVID A. SIRIGNANO
Assistant General Counsel

GERARD S. CITERA
Attorney
Securities and Exchange Commission

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No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHRISTOPHER L. LOWE ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN SUPPORT OF PETITIONERS FOR *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AMERICAN SOCIETY OF MAGAZINE EDITORS AMERICAN SOCIETY OF NEWSPAPER EDITORS ASSOCIATED PRESS MANAGING EDITORS THE MEDIA INSTITUTE NATIONAL NEWSPAPER ASSOCIATION THE NEWSLETTER ASSOCIATION NEWSPAPER GUILD NEW YORK FINANCIAL WRITERS ASSOCIATION SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Of Counsel:
BENJAMIN W. BOLEY
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JACK C. LANDAU
ROBERT S. BECKER
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
800 18th Street, N.W.
Washington, D.C. 20006
(202) 466-6313

NANCY J. BREGSTEIN
(Counsel of Record)
RICHARD M. WYNER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Amici Curiae

[List of counsel continued on inside cover.]

November 15, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

38 pp

Of Counsel:

RICHARD M. SCHMIDT
COHN & MARKS
1333 New Hampshire
Ave., N.W.
Washington, D.C. 20036
Counsel for American Society of Newspaper Editors

RICHARD N. WINFIELD
ROGERS & WELLS
200 Park Ave.
New York, N.Y. 10017
Counsel for Associated Press Managing Editors

ROBERT J. BRINKMANN
NATIONAL NEWSPAPER
ASSOCIATION
1627 K St., N.W.
Washington, D.C. 20006

DAVID BARR
BARR & TEER
1899 L St., N.W.
Washington, D.C. 20036
Counsel for The Newspaper Guild

BRUCE W. SANFORD
BAKER & HOSTETLER
818 Connecticut Ave., N.W.
Washington, D.C. 20006
Counsel for Society of Professional Journalists, Sigma Delta Chi

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IN THE

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OCTOBER TERM, 1984

No. 83-1911

CHRISTOPHER L. LOWE ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici curiae are ten organizations composed of individual and institutional members of the press. *Amici* are both large and small national news organizations that collectively represent a broad spectrum of working journalists, newspapers, magazines, newsletters, and others involved in the gathering and dissemination of financial and investment news to the public.

Specifically, *amici* are the following organizations: The American Society of Magazine Editors has 450 members who are chief and senior editors of consumer, trade, and farm magazines across the United States. The American Society of Newspaper Editors is a nationwide organization of more than 900 directing editors of daily newspapers, dedicated to improving the manner in which the journalism profession serves the American people. The Associated Press Managing Editors includes more than 600 editors of newspaper members of the Associated Press, which gathers news worldwide for dis-

semination to 1,350 newspapers and 3,300 broadcast stations around the world. The Media Institute is a nonprofit research organization which has published numerous reports on foreign and domestic communications policy and studies on broadcast coverage of economic news. The National Newspaper Association is a national organization of 5,500 newspapers, which is dedicated to preserving the constitutional guarantee of freedom of the press.

The Newsletter Association is an international trade association of 850 publishers of 2,500 newsletters and other specialized services which provide financial and other types of information. The Newspaper Guild is a trade union representing 40,000 editorial, advertising, circulation, business and other non-mechanical department employees of newspapers in the United States and Canada. The New York Financial Writers Association includes 350 reporters and editors dedicated to upholding the standards of business and financial journalists. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors devoted to protecting the First Amendment interests of the media. The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 28,000 people from every branch and rank of print and broadcast journalism. It is the largest organization of journalists in the United States.

Amici view the Second Circuit's decision in this case as a significant threat to the free dissemination of news about the financial markets and specific investment opportunities. *Amici* fear that, if this Court affirms the decision below, some financial news organizations will be permitted to publish freely and others will not. This would be out of keeping with our system of a free and independent press. The decision below would permit prior restraints of business publications without any showing of a direct, immediate, and irreparable harm to any vital governmental interest. It approves of censorship in the form of licensing and grants the government and the

courts the power—denied to them by the Constitution—to decide which financial publications are "bona fide." *Amici* believe, on the contrary, that the First Amendment permits any person freely to publish information about any aspect of the social, economic, or political life of our country, including financial trends, stock market predictions, and securities recommendations. Accordingly, *amici* submit this brief in support of petitioners.

Amici have received consent to file this brief from petitioners and from respondent. Their letters of consent have been filed with the Clerk of this Court.

STATEMENT

This case involves the constitutionality, under the First Amendment, of provisions of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* ("Advisers Act" or "Act"), that require all publishers, except publishers of so-called "bona fide" publications, to register with the Securities and Exchange Commission ("the Commission") in order to publish financial newsletters containing recommendations or reports concerning securities. The Commission may deny or revoke the registration of a publisher who is subject to one or more statutory disqualifications, including disqualification for violating the securities laws or for having been convicted of certain crimes during the preceding ten years. The Act allows the Commission to sue to enjoin publication by unlicensed publishers, or to bring criminal prosecutions against them.

Petitioner Christopher Lowe ("Lowe") is president of the three corporate petitioners, including Lowe Management Corporation ("Lowe Management"). Until 1981, Lowe Management was registered with the Commission under the Act and published investment advice and managed the funds of clients on a discretionary basis. In 1977 and 1978, Lowe was convicted in state court of two felonies and two misdemeanors related to this investment advisory business. On the basis of these convictions and Lowe Management's violation of certain provisions of the Act, the Commission revoked Lowe Management's

registration and barred Lowe from association with any investment adviser, pursuant to 15 U.S.C. §§ 80b-3(e) & (f).

Though petitioners were no longer registered with the Commission, they continued to publish or to solicit subscriptions for their investment newsletters. These newsletters contain general descriptions of and commentary on the state of the financial markets, short-term and long-term economic forecasts, and general and specific advice on the relative desirability of various investments, including securities.

Because petitioners were not registered, the Commission sought an order from the District Court for the Eastern District of New York enjoining further publication of their newsletters.[1] The Commission made no claim that the information contained in the newsletters is or has been false or misleading; nor did it allege that petitioners traded in securities discussed in the newsletters or used the newsletters as part of any fraudulent or otherwise unlawful conduct.

The District Court refused to enjoin publication of the newsletters. It reasoned that they constitute protected speech that cannot be prohibited; and it construed the statute to require the Commission to allow (and not to revoke) the registration of any publisher who does not also give personal investment advice. The Court of Appeals for the Second Circuit reversed. Reasoning that the publication of newsletters containing specific investment advice constitutes either "commercial speech" or the practice of a profession, the appellate court held that

[1] As it did in this case, the Commission has recently sought injunctions against the publication of other financial newsletters in *SEC* v. *Wall Street Publishing Institute, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,575 (D.D.C. July 12, 1984), appeal docketed, No. 84-5485 (D.C. Cir. Aug. 2, 1984), stay granted, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,635 (D.C. Cir. Aug. 10, 1984); *SEC* v. *Financial News Associates*, No. 84-0878-A (E.D. Va. filed Aug. 29, 1984); *SEC* v. *Options Strategy Associates, Ltd.*, No. 84 Civ. 4316 (S.D.N.Y. filed June 20, 1984).

the Act constitutionally could require a license for such publication, and that such a license constitutionally could be denied on the basis of prior misconduct. Accordingly, the Court of Appeals ordered that an injunction against further publication of petitioners' newsletters be granted.

SUMMARY OF ARGUMENT

The First Amendment principally forbids prior restraints, including the licensing of the press and injunctions against publication. Yet in this case, the Court of Appeals sanctioned a system of licensing a segment of the financial press and the use of an injunction to bar publication of financial newsletters by unlicensed publishers. The Court of Appeals reached this erroneous ruling by failing to treat financial newsletters as speech fully protected by the First Amendment, and consequently by not applying this Court's precedents forbidding prior restraints except on a showing of the most extraordinary and compelling circumstances.

In Part I.A., we show that the publication of financial newsletters constitutes fully protected speech. This Court has long accorded the full protection of the First Amendment to speech on a variety of subjects, including economic and financial matters. Moreover, the fact that financial newsletters provide specific recommendations concerning investments does not diminish their status as fully protected speech. This Court has never distinguished specific information or advice from abstract discussion, and there is no principled basis for such a distinction. If that were the law, numerous books, magazines, and newspaper features that provide specific advice on many subjects also would receive diminished protection.

The Court of Appeals wrongly concluded that the publication of financial newsletters may be treated as commercial or professional activity of a kind that may be subjected to government regulation and licensing, or as "commercial speech" entitled to less than full First Amendment protection. In Part I.B., we show that the

Court of Appeals failed to perceive the distinction between speech on a commercial or financial subject and "commercial speech." This Court has defined the latter term as commercial advertising, solicitation, or the promotion of the speaker's products or services, and nothing else. Moreover, financial newsletters lack the salient characteristics of "commercial speech" that permit its greater regulation. We also show, in Part I.C., that the Court of Appeals erred in treating the licensing of financial newsletter publishers as an instance of the permissible licensing of professionals. For purposes of the First Amendment, there is a critical difference between rendering personalized professional services and engaging in the publishing of impersonal recommendations. Moreover, no support for the Court of Appeals' holding is provided by cases sustaining regulation of "commercial activity" against First Amendment challenges. In all the cases relied upon by the Court of Appeals, the regulation addressed conduct—either in connection with a publishing business or in which speech played an incidental part—not publication itself.

In Part II, we show that the Act's registration requirement and the injunction against publication by an unregistered publisher constitute presumptively invalid prior restraints, which cannot be permitted in the absence of a compelling justification. No such justification exists in this case, where the principal purpose of the registration requirement—the protection of investors from fraud—can be achieved by more narrowly tailored means that do not suppress protected speech. The Commission may prohibit and punish specific instances of fraud committed by publishers of investment advice. But it may not require them to obtain licenses to publish; it may not deny them the right to publish based on prior misconduct; and it may not obtain injunctions against publishers who have done no more than publish without obtaining the Commission's approval.

ARGUMENT

I. FINANCIAL NEWSLETTERS ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The Court of Appeals relied on alternative premises in support of its conclusion that the publication of financial newsletters constitutionally may be licensed, and that publication by unlicensed publishers constitutionally may be enjoined.[2] One was that the investment advice contained in financial newsletters constitutes "commercial speech." 725 F.2d at 900 (Pet. App. A17). The Court of Appeals' preferred basis for its decision, however, was that financial newsletters do not constitute "speech" at all, 725 F.2d at 901 (Pet. App. A17-18), but instead constitute commercial activity that may be regulated or professional conduct that may be licensed. *Id.* We show in this Part that financial newsletters constitute fully protected speech, and that the Court of Appeals' alternative characterizations are incorrect.

A. The First Amendment Fully Protects Financial and Economic Advice.

The Court of Appeals seems to have concluded that because financial newsletters are specialized publications dealing with matters of a financial and economic nature, including specific investment advice, they are entitled to less than the full protection of the First Amendment. This is a crabbed reading of the First Amendment. It is inconsistent with this Court's broad interpretation of the essential coverage of the Amendment, even before and apart from the Court's extension of that coverage to encompass "commercial speech." "The guarantees for speech and press are not the preserve of political expres-

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[2] An investment adviser who renders individualized advice to particular clients, and who also publishes an investment newsletter, must be registered with the Commission on account of his personalized investment advisory business. We do not address that situation in this brief, but confine our discussion to publishers, like petitioners, who engage solely in publishing investment newsletters and who do not also render personalized advice.

sion or comment upon public affairs," *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967); rather, these guarantees "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). Thus, the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02. See also *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967).

These general principles are fully applicable to speech about economic or financial matters. As this Court made plain in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977), its "cases have never suggested that expression about . . . economic . . . matters . . . is not entitled to full First Amendment protection." See also *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945). Indeed, in extending some First Amendment protection to "commercial speech," in the form of advertising by a pharmacist, the Court explained that its holding went beyond the protection theretofore afforded by the Amendment to "speech on a commercial subject." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). "No one," the Court said, "would contend that [the] pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden." *Id.* at 761-62. To the extent, therefore, that financial newsletters discuss economic, financial, or investment matters generally, there can be no doubt that they are fully protected by the First Amendment.

The narrower focus of this case is the provision of investment *advice* by newsletters, in the form of analyses and reports as to the value of specific securities and recommendations regarding purchasing, selling, or holding specific securities. 725 F.2d at 902 (Pet. App. A20).[3] This Court has never suggested, however, that publications containing specific advice are, for that reason, not entitled to full First Amendment protection; and there is no principled basis for so concluding. Speech is not deprived of the full protection of the First Amendment merely because it is practical and potentially useful, rather than being of broad, abstract import. For example, there is "no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute." *Virginia Pharmacy Board*, *supra*, 425 U.S. at 762-63 (citing *Thornhill* v. *Alabama*, *supra*). Cf. *Thomas* v. *Collins*, *supra*, 323 U.S. at 531 ("Great secular causes, with small ones, are guarded.").

Moreover, there is no distinction of constitutional significance between "general" and "specific" investment recommendations—that is, for example, between a prediction of the future course of the stock market as opposed to a recommendation to buy stock in one company rather than another. As Judge Weinstein observed below, there is "no sharp demarcation in the range of economic observation that runs from comment on economic policy to prediction of the performance and recommendation of specific securities." 556 F. Supp. at 1367 (Pet. App. A56). Nor does the fact that readers may act on the basis of specific advice diminish its constitutional protection. See, *e.g.*, *Thomas* v. *Collins*, *supra*, 323 U.S. at 537. For these reasons, the First Amendment does not require that protected speech address itself only to the state of the economy and financial markets in general, while steering clear of stating facts, opinions, or recommendations about particular investments.

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[3] The Court of Appeals stated that it would "leave to another day the question whether a publication dealing only with market indicators generally or making recommendations only as to groups of securities . . . could be barred . . . ." 725 F.2d at 902 n.7 (Pet. App. A20).

If its characterization as concrete advice disentitled speech to some portion of First Amendment protection, then many newspaper features would be vulnerable to government regulation—including editorials telling politicians how to legislate or voters how to vote, and columns containing advice on the subjects of health, careers, education, bridge, gardening, home repair, personal problems, and countless other subjects on which people may wish to be informed and advised. The same would be true of advice provided in books, periodicals, and newsletters.[4] More specifically, if speech is to be given less protection because it is advice on how to spend or save money, then such a restriction would apply not only to advice on investments, but also to advice, criticism, and recommendations in articles on and reviews of restaurants, movies, health care, vacation packages, and consumer products—on which the average American probably spends more than he invests in securities. Yet the courts have uniformly treated such articles and reviews as fully protected speech.[5] Thus,

[4] Thousands of periodicals and newsletters are published in this country, on practically every subject imaginable, including scores of newsletters on the subject of investment alone. For a list and brief descriptions of these publications, see *The Standard Periodical Directory* (8th ed. 1983-84); *Oxbridge Directory of Newsletters* (1983-84).

[5] See *Bose Corp.* v. *Consumers Union*, 508 F. Supp. 1249, 1269-77 (D. Mass. 1981), *aff'd in pertinent part and rev'd in part*, 692 F.2d 189, 194 (1st Cir. 1982), *aff'd*, 52 U.S.L.W. 4513, 4521 (U.S. Apr. 30, 1984) (review of loudspeaker system in *Consumer Reports*); *United Medical Laboratories, Inc.* v. *CBS, Inc.*, 404 F.2d 706 (9th Cir. 1968) (reports on practices of medical testing laboratories); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970) (magazine comments on resort hotel accommodations and services); *General Prods. Co.* v. *Meredith Corp.*, 526 F. Supp. 546 (E.D. Va. 1981) (magazine article on use of wood stoves for heating); *Simmons Ford, Inc.* v. *Consumers Union*, 516 F. Supp. 742 (S.D.N.Y. 1981) (review of electric cars); *Twenty-Five East 40th Street Restaurant Corp.* v. *Forbes, Inc.*, 322 N.Y.S.2d 408 (App. Div. 1971), *aff'd*, 331 N.Y.S.2d 29 (1972) (restaurant review); *Farnsworth* v. *Tribune Co.*, 253 N.E.2d 408 (Ill. 1969) (newspaper report on practices of an

the fact that financial newsletters contain investment recommendations concerning specific securities does not detract from their entitlement to full First Amendment protection.[6]

B. Speech About Financial or Economic Matters, Including Investment Recommendations, Is Not "Commercial Speech."

In the past decade, this Court has found a degree of protection in the First Amendment for a category of

osteopathic physician); *All Diet Foods Distribs., Inc.* v. *Time, Inc.*, 290 N.Y.S.2d 445 (Sup. Ct. 1967) (derogatory implications of photograph in book on nutrition). See also Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 1 (1979).

[6] In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18, *reargument requested*, 52 U.S.L.W. 3937 (U.S. June 26, 1984), this Court is considering whether credit reports provided by Dun & Bradstreet to its subscribers, as speech of a "commercial or economic nature," is entitled to the protection of the rule of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), against presumed or punitive damages in a libel action. We agree with petitioner Dun & Bradstreet that its credit reports are entitled to full First Amendment protection. Even if this Court were to decide that they are not, however, that decision would not dictate the correct decision in this case.

First, the credit reports in *Dun & Bradstreet* are not like the contents of financial newsletters. The credit reports are sold to purchasers on individual order; that is, they are provided only to a "subscriber" who requests a report on the creditworthiness of a particular business. The sale of credit information in response to particularized inquiries can more readily be characterized as commercial activity that may be regulated than the publication of a newsletter containing stock recommendations received by hundreds or thousands of subscribers. Second, even if there were no difference in the character of the communications involved here and in *Dun & Bradstreet*, there remains a difference in the type of regulation involved in the two cases. Here, the government asserts its authority to impose a prior restraint, in the form of a licensing requirement enforceable by an injunction against publication, whereas in *Dun & Bradstreet* the issue is what damages are permissible. The availability of presumed or punitive damages has a chilling effect on protected speech; but it does not impose the absolute ban of a prior restraint.

speech that it has labeled "commercial speech." On repeated occasions, however, the Court has noted that commercial speech will not necessarily be entitled to the same level of protection as more traditionally protected speech. See, *e.g.*, *Bolger* v. *Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4962 (U.S. June 24, 1983); *Virginia Pharmacy Board, supra*, 425 U.S. at 771-72 n.24. Accordingly, the Court of Appeals thought it possible to sustain the Act's registration requirement, and an injunction against publication by an unregistered publisher, by treating investment newsletters as commercial speech.

For this Court to adopt the Second Circuit's view would be an expansion of the scope of the commercial speech doctrine totally at odds with this Court's prior decisions. As this Court has applied the term to date, "commercial speech" has meant commercial advertising, promotion, or solicitation, and nothing more.[7] Despite this exclusive focus, the Court of Appeals opined that this Court has not "limited commercial speech solely to product or service advertising." 725 F.2d at 900 (Pet. App. A17). The Court of Appeals relied primarily on the fact that while this Court originally defined commercial speech as speech that does "no more than propose a commercial transaction,"[8] it also, and more recently,

[7] See *Bolger* v. *Youngs Drug Prods. Corp.*, *supra* (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (1982) (advertising legal services); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) (commercial advertising on billboards); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980) (promotional advertising for electric power); *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (optometrists' solicitation of patronage by use of trade names); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (in-person solicitation of paying clients by lawyer); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (advertising legal services); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) (advertising houses for sale); *Virginia Pharmacy Board, supra* (advertising by pharmacists).

[8] See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

has described commercial speech as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561 (1980), and as "speech . . . linked inextricably to commercial activity." *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979).[9]

We submit that these formulations, when properly read in context, do not and were not intended to broaden this Court's basic definition of commercial speech. Rather, it seems clear that in both *Central Hudson* and *Friedman*, the Court employed a new formulation because it found itself confronted with promotional advertising that nevertheless could not be said to "propose" a particular "commercial transaction." Thus, the utility's promotion of the use of electricity in *Central Hudson*, and the optometrists' use of trade names to solicit patronage in *Friedman*, both served to promote the sale of the speakers' products or services. Moreover, the language employed in *Central Hudson* plainly cannot be given its broadest literal interpretation, which also would cover, for example, discussion of the merits of raising taxes or school teachers' salaries, joining a union, or imposing import quotas on foreign goods. And the Court in *Friedman* did not *define* commercial speech as "speech . . . linked inextricably to commercial activity"; rather, it *observed* that "commercial speech is linked inextricably to commercial activity"—because, after all, commercial speech proposes or promotes a commercial trans-

[9] The Court of Appeals also noted that commercial speech cannot be equated with advertising, since fully protected speech that happens to appear in the form of a paid advertisement nevertheless retains its fully protected status. 725 F.2d at 900 (Pet. App. A17); see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). We agree that "[i]f commercial speech is to be distinguished, 'it must be distinguished by its content,'" not by its form, *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 363, but the content that makes something "commercial speech" is promotion of one's own commercial products or services, and nothing else.

action. In short, this Court has not departed from the proposition that there must be a commercial, promotional element in speech—even if implicit or derived from the context—to make it "commercial speech," see *Bolger* v. *Youngs Drug Products Corp.*, *supra*, 51 U.S.L.W. at 4963 n.13, and this Court has not applied that definition to any other type of communication.[10]

Financial newsletters fall outside this definition of "commercial speech." While such newsletters may recommend the purchase of particular securities, the publisher of the newsletter does not sell securities or receive a commission on such sales.[11] As long as the speaker does

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[10] To be sure, this Court has held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger* v. *Youngs Drug Prods. Corp.*, *supra*, 51 U.S.L.W. at 4963 (quoting *Central Hudson Gas & Elec. Corp.*, *supra*, 447 U.S. at 563 n.5). But the premise of this statement is that the speaker is the seller of the product in question and that the comments on public issues "are made solely in the context of commercial transactions," 51 U.S.L.W. at 4963, see *Central Hudson*, *supra*, 447 U.S. at 562-63 n.5; its rationale is that promotional advertising cannot attain a higher level of constitutional protection by being sandwiched between "references to public issues." 51 U.S.L.W. at 4963. The element of promotion of one's own products or services remains, and is critical to the commercial speech characterization.

[11] Of course, the publisher of a newsletter profits by the sale of subscriptions. This in no way diminishes his entitlement to First Amendment protection, however, since speech "is protected even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Board*, *supra*, 425 U.S. at 761. See also *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 363. Otherwise, there would be no First Amendment protection for any book, movie, magazine, or newspaper that is not given away free of charge, as this Court often has pointed out. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, *supra*, 413 U.S. at 384-85; *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966); *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 266; *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952).

not propose a commercial transaction between himself and the reader or promote the sale of his own products or services, his expression is not "commercial speech."

Moreover, financial newsletters lack the salient characteristics of commercial speech that make appropriate "a different degree of protection." *Virginia Pharmacy Board*, *supra*, 425 U.S. at 771-72 n.24. First, the accuracy of such speech is more easily verifiable by its disseminator than, for example, news reporting or political commentary, "in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Id.* Since newsletters comment on securities issued and sold by others, and consist of unverifiable opinions as much as facts, this characteristic is lacking.

Similarly, this Court has focused on the "hardiness" of commercial speech, because speech motivated by the desire to make a sale is less likely to be chilled than other speech. *Id.* Again, this observation has no bearing on reporting on investments that the publisher is not attempting to sell, any more than it would be applicable to publishers of magazines, books, or daily newspapers, who also have an interest in maximizing revenues through subscriptions or sales. Thus, we submit, not only does the Court's traditional definition of "commercial speech" not fit petitioners' newsletters, but the salient characteristics of commercial speech, which allow its greater regulation, also are absent.[12]

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[12] A third characteristic of commercial speech that permits its greater regulation is that it generally is not urgent or timely. The information and recommendations in investment newsletters, on the other hand, are valuable either now or never. Accordingly, it would be inappropriate to apply to financial newsletters the prescreening requirements that sometimes apply to commercial speech.

Finally, the incentive to use commercial speech in a misleading way is also absent in the case of newsletters. The publisher of an

C. Prohibiting the Publication of Financial Newsletters by Unregistered Publishers Is Not Like the Regulation of Commercial Activity or the Licensing of Professionals.

The Court of Appeals' alternative and "preferred" basis of decision was that the publication of financial newsletters without a license constitutionally may be prohibited under decisions sustaining the regulation of commercial activity and the licensing of professionals. Neither line of cases is applicable, however.

1. *Regulation of commercial activity.*

The cases identified by the court below as permitting the "regulation of commercial activity" stand for two different, but related, propositions. One line of cases establishes that a business is not immune from "generally applicable economic regulations" simply because it is part of the press. *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983). A second line of cases demonstrates that "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), *quoted in Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

Publishing is, of course, a commercial activity, in that it is a business carried on for profit. But publishing itself, without more, cannot be made unlawful without clashing directly with the First Amendment. For purposes of First Amendment analysis, therefore, "commercial activity" that may be regulated and "publishing" as such are mutually exclusive categories. When a publisher engages in some business or commercial practices apart from just publishing, however, that conduct may be regulated or prohibited just as it would be if engaged in by any other business. Thus, for example, a newspaper is subject to the federal antitrust laws, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-40 (1969), state laws against restraint of trade, *Giboney* v. *Empire Storage & Ice Co.*, *supra*, the federal labor laws, *Associated Press* v. *NLRB*, 301 U.S. 103, 132-33 (1937), and the federal minimum wage laws, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-93 (1946). Indeed, these laws are applicable to any newsletter publisher that comes within their respective terms. In each of these cases, however, what is regulated is some conduct other than publishing itself, and the regulation therefore "ends in no restraint upon expression or in any other evil outlawed by [the First Amendment's] terms and purposes." *Id.* at 193 & n.8.

Similarly, there is no support for the Court of Appeals' holding in this Court's acknowledgment that communications may be regulated without offending the First Amendment when they merely further an unlawful course of conduct. See *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 456. In each of the examples cited by the Court in *Ohralik*—including the exchange of inside information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), the issuance of corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969)—the subject of the regulation properly may

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investment newsletter—like any publisher of newspapers, books, or magazines—likely will sell more subscriptions if its reporting and recommendations prove informative, useful, and reliable than if they do not, since it is "selling" speech itself, not using speech to sell some other product.

be characterized as "commercial activity," in which speech is simply a component. *Ohralik*, *supra*, 436 U.S. at 456. The same cannot be said of publishing investment recommendations, without more.

2. *Licensing of professionals.*

The Court of Appeals also relied on cases sustaining the regulation and licensing of professionals. 725 F.2d at 901 (Pet. App. A18-19). The court reasoned that if the States may require the licensing of professionals—including, most notably, lawyers and doctors—then Congress similarly may require the licensing of investment advisers, including publishers of investment advice. This view overlooks the fact that the First Amendment carves out the occupation or profession of publishing from among other professions and immunizes it from licensing or similar requirements. It is necessary to determine, therefore, whether financial newsletter publishers are engaged in the regulable profession of investment advising or the immunized profession of publishing.

The absence of individualized, personal interaction between the publisher and his subscribers distinguishes publishing a newsletter from engaging in a regulable profession. This distinction was fully appreciated by the District Court and the dissenting judge in the Court of Appeals. See 725 F.2d at 903-04 (Pet. App. A23-24) (Brieant, J., dissenting); 556 F. Supp. at 1365, 1369 (Pet. App. A62) (Weinstein, J.). First, the publisher of an investment newsletter has no authority over the funds of clients. Thus, a substantial component of an investment adviser's business that involves conduct—in the form of initiating securities transactions—is entirely lacking in the case of a newsletter publisher. Second, the newsletter publisher has no information about or familiarity with the individual circumstances of his subscribers, and does not tailor his advice to those circumstances. As a corollary, his subscribers cannot delegate decision-making authority to him, nor rely on his advice in the

way that a client in a one-to-one relationship with his investment adviser relies on the latter's advice. Thus, there is a gap between the publisher's expression of views and the subscriber's application of those views to his own circumstances. That gap, we submit, breaks the personal nexus between adviser and client that is the quintessential element of any professional relationship, including one involving an investment adviser.

Judge Brieant, dissenting below, concisely described the distinction between publishing advice and opinion, on the one hand, and engaging in the practice of a profession, on the other:

> "The expression of opinion [in a financial newsletter] is poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.*, 'Prevention Magazine') is from the practice of medicine, or a book advising how to avoid probate is remote from the practice of law. The latter require a medical or law degree and a license, while the former are protected First Amendment expression." 725 F.2d at 903 (Pet. App. A23-24).

Numerous decisions concerning the licensing of professionals bear out this distinction. In the leading case of *New York County Lawyers Association* v. *Dacey*, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967), the New York Court of Appeals held, by adopting the dissenting opinion in the Appellate Division, that authors or publishers of books giving estate planning advice, who are not members of the Bar, are not engaged in the unauthorized practice of law; and that, under the First Amendment, they may not be enjoined from publishing such advice. The opinion explained:

> "Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential element of legal practice—the representation and advising of a particular person in a particular situation." 283 N.Y.S.2d 984, 998 (App. Div. 1967).

The *Dacey* distinction has been found persuasive in every State but one in which the question has been considered.[13]

It therefore would be erroneous, and in conflict with the First Amendment, to characterize the publishing of an investment newsletter as the practice of a profession. Moreover, this would be a dangerous precedent. If giving advice or making recommendations by impersonal publication is deemed to be engaging in a profession—or, indeed, in any occupation for which a license may be required—then government similarly may require a license to publish books or pamphlets giving advice on countless subjects. The extreme nature of such a result demonstrates the incorrectness of the underlying premise.

II. IN PROHIBITING THE PUBLICATION OF FINANCIAL NEWSLETTERS WITHOUT A LICENSE, THE ACT IMPOSES AN UNCONSTITUTIONAL PRIOR RESTRAINT.

As we have just demonstrated, financial newsletters contain speech that is fully protected by the First Amendment. The Advisers Act, however, makes it "unlawful for any investment adviser, unless registered . . . , to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser." 15 U.S.C. § 80b-3(a). For purposes of the Act, an "investment adviser" is "any person who, for compensation, engages in the business of advising others, either directly or *through publications or writings*, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who . . . issues or promulgates analyses or re-

[13] See *Florida Bar* v. *Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *State ex rel. Schneider* v. *Hill*, 573 P.2d 1078 (Kan. 1978); *State Bar* v. *Cramer*, 249 N.W.2d 1 (Mich. 1976); *In re Thompson*, 574 S.W.2d 365 (Mo. 1978); *State* v. *Winder*, 348 N.Y.S.2d 270 (App. Div. 1973); *Oregon State Bar* v. *Gilchrist*, 538 P.2d 913 (Or. 1975). But see *Palmer* v. *Unauthorized Practice Comm.*, 438 S.W.2d 374 (Tex. Civ. App. 1969).

ports concerning securities . . . ." *Id.* § 80b-2(a)(11) (emphasis added). The Act contains several exclusions from its definition of "investment adviser," including one for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." *Id.* § 80b-2(a)(11)(D). This exclusion has been construed narrowly, however, and is applicable "only where, based on the content, advertising material, readership, and other relevant factors, a publication is not primarily a vehicle for distributing investment advice." SEC Investment Advisers Act Release No. 563, 42 Fed. Reg. 2953 (Jan. 10, 1977) (citing *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970)).

Thus, unless the "bona fide newspaper" exclusion is applicable, a publisher must register with the Commission as an investment adviser in order to publish investment advice or reports concerning securities. The Act authorizes the Commission to enforce this ban on publication by unregistered publishers either by applying to a court for an injunction against publication, 15 U.S.C. § 80b-9(e)—the route chosen by the Commission in this case—or by seeking criminal penalties for publishing in violation of the statute. *Id.* § 80b-17. In either case, as we now show, the Act's prohibition of publication by those not registered with the Commission imposes a prior restraint on protected speech, which "'comes to this Court bearing a heavy presumption against its constitutional validity.'"[14] *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co.* v. *United States*, *supra* (quoting *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415,

[14] See generally Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955); Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409 (1983).

419 (1971)). The Commission cannot sustain that heavy burden in this case.

A. The Prior Restraint Imposed by the Act's Registration Requirement Cannot Be Justified.

The term "prior restraint" is used loosely "to embrace a variety of different situations." Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 655 (1955). The registration requirement of the Act presents "[t]he clearest form of prior restraint," in that, as applied to financial newsletters, it "undertakes to prevent future publication . . . without advance approval of an executive official." *Id.* Thus, a publisher can be prosecuted or enjoined from publishing not because of the unprotected content or manner of his speech, but merely because he did not procure a license from the government in advance. *Id.* See also Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 417-18 (1983).

The Act's registration requirement operates as an unconstitutional prior restraint in two ways. First, it requires *all* financial publishers to obtain licenses to publish, unless the "bona fide newspaper" exclusion is applicable.[15] Second, the Act authorizes the Commission to refuse to allow registration by some prospective publishers, like

[15] The "bona fide newspaper" exclusion does not save the Act from its constitutional infirmity because, as interpreted, it fails to exclude newsletters and other constitutionally protected publications from the Act's coverage. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-85 (1978). Freedom of the press, as a "fundamental personal right," is not "confined to newspapers and periodicals," *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938), and it certainly is not limited to "bona fide newspaper[s], news magazine[s] or business or financial publication[s] of general and regular circulation"—whatever that phrase may mean. Rather, "[t]he press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.* at 452. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972).

petitioners, on account of their statutory disqualification. Those publishers do not even have the option of procuring a license in order to publish lawfully. While only the latter situation is directly involved in this case, we here address both applications of the statute.

1. *The Act unconstitutionally compels financial publishers to register with the government.*

To comply with the Act's registration requirement, a publisher must submit extensive information to the Commission.[16] He then must wait for approval before publishing. Even when there is no question of disqualification, the Commission need not act on an application for 45 days; and if the Commission decides to investigate further, it can take up to seven months to act on the application. 15 U.S.C. §§ 80b-3(c)(2)(A) & (B).

These provisions, which require newsletter publishers to register with the government prior to publication, are invalid under the First Amendment. As this Court has long recognized, the freedom to publish written materials without identifying oneself to the government is at the heart of the Amendment.[17] In *Talley* v. *California*,

[16] This information includes the names of the publisher and his or its partners or officers, as well as their address and number of employees; the education and business affiliations of the publisher and his or its partners or officers for the past ten years; a statement of the nature of the business of the publisher, including the manner of giving advice and rendering analyses or reports; and a balance sheet certified by an independent public accountant. 15 U.S.C. §§ 80b-3(c)(1)(A)-(D).

[17] Of course, the press is not immune from regulations that are applicable to businesses generally and that may include a duty to file information with the government. See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, *supra*, 460 U.S. at 586-87 n.9 (nondiscriminatory taxation laws) (dictum); *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 192-93 (Fair Labor Standards Act). But the Court has never intimated that publishers constitutionally may be required to identify themselves solely with respect to the fact of publication.

362 U.S. 60 (1960), the Court struck down a city ordinance that forbade the public distribution of hand-bills unless they contained the name and address of the printer and the distributor, on the ground that "such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. Similarly, *Thomas* v. *Collins*, 323 U.S. 516 (1945), "held unconstitutional a prior restraint in the form of a registration requirement for labor organizers." *Buckley* v. *Valeo*, 424 U.S. 1, 81 (1976). Even though registration in *Thomas* would have been granted as a matter of course and used solely for identification purposes, the Court noted that as long as nothing more than speech is involved, any registration requirement, even if ministerial, is "quite incompatible with the requirements of the First Amendment." 323 U.S. at 540.[18] Accordingly, except for situations involving speech intertwined with conduct,[19] or occurring in special settings,[20]

[18] See also *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (1913). In that case, this Court upheld application of the Post Office Act's registration requirement to newspapers on the ground that the Act required such registration only as a prerequisite to enjoyment of the privilege of second class mail rates. The implication is clear that the requirement would have been held unconstitutional had it applied to newspapers distributed through the regular mails.

[19] For example, informational licensing may be required in order to engage in solicitation. See *Village of Schaumburg* v. *Citizens For a Better Environment*, 444 U.S. 620, 637-38 (1980); *Cantwell* v. *Connecticut*, 310 U.S. 290, 306 (1940). As the lower courts have recognized, solicitation stands on a different constitutional footing from the publishing and distribution of printed literature. See, *e.g.*, *International Society for Krishna Consciousness* v. *City of Houston*, 689 F.2d 541, 556 (5th Cir. 1982); *Rosen* v. *Port of Portland*, 641 F.2d 1243, 1251 n.17 (9th Cir. 1981).

[20] The Court indicated in *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 619 (1976), that a state could require informational registration of persons engaged in door-to-door canvassing or soliciting, on the ground that there is no absolute First Amendment right to "enter on the private premises of another and knock on a door for any purpose."

or where an overriding national interest in disclosure has been demonstrated,[21] this Court has not sanctioned even ministerial licensing of the written press as a precondition to the right to publish.[22]

When tested against this background, the registration provisions of the Advisers Act—which call for substantial information in addition to the publisher's name and address and permit a prolonged delay in the registration process—cannot stand as applied to financial newsletter publishers. Such publishers are engaged in pure speech, not solicitation. They communicate with willing listeners, and do not intrude upon private property. Any interests served by the requirement—including, presumably, assistance in investigating potential fraud—fall far short of those overriding national interests for which compelled registration has been approved.

2. The right to publish may not constitutionally be denied on grounds of prior misconduct.

The Commission has the authority, under 15 U.S.C. §§ 80b-3(c) and (e), to deny or revoke registration if it

[21] For example, informational registration requirements have been upheld where necessary to safeguard the functioning of our national institutions, see *Burroughs* v. *United States*, 290 U.S. 534 (1934) (Federal Corrupt Practices Act); *United States* v. *Harriss*, 347 U.S. 612 (1954) (Federal Regulation of Lobbying Act), or where national security or violence were involved, see *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928).

[22] The principle of *Talley* and *Thomas*—that government cannot require the registration of persons who seek to do no more than speak—has been applied in other settings by the Courts of Appeals. For example, the First Circuit has struck down city ordinances requiring newspaper vendors on city sidewalks to obtain licenses in advance, even though such licenses were automatically granted by city authorities. *Wulp* v. *Corcoran*, 454 F.2d 826, 834 (1st Cir. 1972); *Strasser* v. *Doorley*, 432 F.2d 567 (1st Cir. 1970). Similarly, the Ninth Circuit has held that persons seeking to do no more than distribute written literature in public facilities cannot be required to register with governmental authorities. *Rosen* v. *Port of Portland*, *supra*, 641 F.2d at 1250-51.

finds that the applicant or registrant is subject to a statutory disqualification. In the instant case, the Commission deregistered Lowe Management and barred Lowe from association with any investment adviser based on Lowe's state court convictions and certain violations of the Act's reporting and disclosure requirements. *In re Lowe Management Corp.* [1981 Transfer Binder), Fed. Sec. L. Rep. (CCH) ¶ 82,873 (May 11, 1981). Thus, petitioners cannot obtain the license that is the prerequisite to publishing lawfully.[23]

The purpose of the disqualification provision is the protection of the investing public from securities fraud and related infractions. See generally *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).[24] The Act's disqualification provision attempts to promote the government's interest in protecting investors by preventing the giving of *any* investment advice by persons who, in Congress' view, may be more likely than others to engage in fraudulent practices. But "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), *quoted in Village of Schaumburg* v. *Citizens For a Better Environment*, 444 U.S. 620, 637 (1980). Even on the assumption that the prevention of securities fraud is " 'a sub-

[23] The Court of Appeals stated that Lowe is not prohibited "from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer." 725 F.2d at 902 (Pet. App. A20). This does not affect the constitutionality of the restraint imposed, however, because "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939).

[24] For example, investment recommendations may constitute part of a fraudulent "scalping" scheme, in which a person (whether a newsletter publisher or personal adviser) "purchas[es] shares of a security for his own account shortly before recommending that security for long-term investment and then immediately sell[s] the shares at a profit upon the rise in the market price following the recommendation." *SEC* v. *Capital Gains Research Bureau, Inc., supra*, 375 U.S. at 181.

ordinating interest which is compelling,' " *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978) (citations omitted), the government must "employ means 'closely drawn to avoid unnecessary abridgment . . . .' " *Id.* (quoting *Buckley* v. *Valeo*, *supra*, 424 U.S. at 25.

Denying the right to publish is not a closely drawn, narrowly tailored means of dealing with the problem of potential securities fraud. On several occasions this Court has struck down other permit requirements for which the government offered a similar justification. In *Schneider* v. *State*, 308 U.S. 147 (1939), a municipality urged the prevention of fraud as its justification for prohibiting leafletting and soliciting without a permit. While "[c]onceding that fraudulent appeals may be made in the name of charity and religion," the Court nevertheless held:

> "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Id.* at 164.

See also *Village of Schaumburg*, *supra*, 444 U.S. at 636-37; *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). As the Court said in *Schaumburg*, "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637.

Nor is the Act's insufficient justification aided by the fact that licenses are denied on the basis of prior misconduct involving fraud or violation of the securities laws. As this Court held in rejecting a similar argument in *Kunz* v. *New York*, 340 U.S. 290, 294-95 (1951):

> "The court below has mistakenly derived support for [upholding the denial of a license] from the evidence . . . that appellant's religious meetings

had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. 'In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment.' *Near* v. *Minnesota*, 283 U.S. 697, 715 (1931). We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize. We are here concerned with suppression—not punishment."

Based on *Kunz* and *Near*, licensing schemes have uniformly been held unconstitutional when they provide that "future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct." *Universal Amusement Co.* v. *Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (*en banc*), *aff'd*, 445 U.S. 308 (1980).[25]

Sufficient remedies short of prior restraint are available and in place to deal with the kinds of securities fraud by publishers with which the Commission is concerned.[26] It is unlawful for publishers to act secretly as publicity agents, paid by persons already holding positions in recommended stocks. "[S]ensationalists who promise miracles in the market which they can hardly deliver" may be dealt with by means of restrictions on deceptive advertising. To the extent that "out-and-out tipsters" falsely claim to have inside information, in order to dupe subscribers into investing in stocks in which they hold positions or are otherwise personally interested, such deceit may be punished or subjected to civil lia-

[25] See also *Fernandes* v. *Limmer*, 663 F.2d 619, 629-30, 632 (5th Cir. 1981); *Entertainment Concepts, Inc., III* v. *Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *International Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809, 832-33 (5th Cir. 1979); *Collin* v. *Chicago Park District*, 460 F.2d 746, 753-54 (7th Cir. 1972); *San Juan Liquors, Inc.* v. *City of Jacksonville*, 480 F. Supp. 151, 153-54 (M.D. Fla. 1979); *Bayside Enterprises, Inc.* v. *Carson*, 470 F. Supp. 1140, 1142-45 (M.D. Fla. 1979).

[26] See Brief for Appellant at 19-23, *SEC* v. *Lowe*, 725 F.2d 892 (2d Cir. 1984).

bility. As this Court held in *Schneider* v. *State*, *supra*, 308 U.S. at 164, the possibility that these remedies may be "less efficient and convenient" than a prior restraint is precisely the argument that is rejected by the First Amendment. Congress may not prohibit all publication that it suspects may result in problems that may be dealt with more narrowly, if and when they arise.[27]

B. The Publication of Financial Newsletters by Unregistered Publishers Cannot Be Enjoined.

The use of an injunction to enforce the Act's registration requirement also is unconstitutional. Because "it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication," *Near* v. *Minnesota*, *supra*, 283 U.S. at 713, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 725-26 (Brennan, J., concurring). Instead, if the government is to obtain an injunction against publication, it must prove that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (White, J., concurring). *See Organization For a Better Austin* v. *Keefe*, *supra*; *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977). See also *Bantam Books, Inc.* v. *Sullivan*, *supra* (informal system of prior re-

[27] A ruling that the Act's registration requirement, as applied to financial newsletter publishers, violates the First Amendment would not prevent the Commission from enforcing the antifraud provisions of the Advisers Act, 15 U.S.C. § 80b-6. Publishers of financial newsletters to whom the "bona fide newspaper" exclusion is inapplicable would remain within the Act's definition of "investment adviser," and therefore would remain subject to the Act's requirements that apply to investment advisers who are exempt from registration, including the antifraud provisions. To the extent that the Commission used the antifraud provisions to attack specific fraudulent conduct (but not pure speech)—as it did in *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*—its application to financial publishers probably would not be constitutionally objectionable.

straint held unconstitutional). "[O]nly governmental allegations and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 726-27 (White, J., concurring).

The Commission's interests fall far short of meeting this exacting standard. The justification for an injunction is derived from, and rises no higher than, the justification for the Act's registration and disqualification provisions. As we have just shown, however, these provisions are overly broad means of furthering the Commission's legitimate interest in preventing and punishing securities fraud. Since these provisions themselves cannot withstand constitutional scrutiny, as applied to publishers, it follows *a fortiori* that publication by an unregistered published may not be enjoined.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel:

BENJAMIN W. BOLEY
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JACK C. LANDAU
ROBERT S. BECKER
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
800 18th Street, N.W.
Washington, D.C. 20006
(202) 466-6313

NANCY J. BREGSTEIN
(Counsel of Record)
RICHARD M. WYNER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Amici Curiae

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No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER L. LOWE, *et al.*,
Petitioners,

v.

SECURITIES EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROBERT M. WEINBERG
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 95 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

Publications and other forms of expression analyzing the value and the advisability of purchasing specific products or services have become an important part of

our national discourse. The notion that a person may be barred from engaging in this discourse on the basis of a prior criminal record appears on its face to strike at the core of the protection of free speech afforded by the First Amendment. The court below has authorized a prior restraint on expression in the absence of any showing that might justify a prior restraint on free speech. That court has sought to justify its approval of the prior restraint here solely on the ground that the expression being suppressed is entitled to a lesser degree of First Amendment protection. Neither of the theories offered by the lower court to sustain that conclusion can bear analysis.

1a. Petitioners' newsletters have none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction.'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385). And, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other proposals for a commercial transaction, and not other kinds of speech.

b. Aside from the "commercial speech" just discussed, this Court has never described a category of speech of a "commercial or economic nature" that is less deserving of First Amendment protection than other speech, and this Court's precedents leave no room for any such category. This Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the

degree of First Amendment protection afforded to his speech. Similarly, the Court has made clear that speech relating to financial or economic matters is an important part of our national discourse, and deserving of full First Amendment protection.

2. The lower court's assertion that the First Amendment does not prohibit the regulation of speech as part of the regulation of economic activity is based upon cases that stand for a much narrower proposition: "[T]he constitutional freedom for speech and press [does not extend] its immunity to speech or writing used as an *integral part of conduct* in violation of a valid . . . statute." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (emphasis added). When a First Amendment question is raised, the fact that the justification for restricting speech is an otherwise valid economic regulation is the beginning, not the end, of analysis. Were it otherwise, the state by its definition of illegal conduct could remove nearly any form of speech from the protection of the Constitution.

The wrong asserted here by the SEC, and the court below, is that by publishing these newsletters petitioner Lowe is practicing the profession of investment adviser without a license. We do not doubt that the legislature may establish requirements for those who wish to practice much of what is done by investment advisers. But it does not follow that the legislature may precondition the right to publish, in the general marketplace of ideas, facts and opinions concerning the relative merit of specific investments. If such expression is protected by the First Amendment, that expression does not lose that protection simply because the legislature defines publication of investment newsletters as part of the practice of an investment adviser and thereby claims the right to license the expression.

The question thus becomes whether, consistent with the First Amendment, the government may require a

license as a prerequisite to the opportunity to publish an investment newsletter. And, the answer to that question could not be more clear. As the Court in *Lovell v. Griffin*, 303 U.S. 444, 451, concluded, "it strikes at the very foundation of the freedom of the press [to] subject[] it to license and censorship." The SEC's asserted power to license, and therefore to prohibit, petitioners' publication of their newsletter violates the First Amendment.

ARGUMENT

Petitioners in this case publish newsletters. These newsletters are circulated to an average of over 5,000 subscribers, and at times up to 19,000 subscribers. One of the newsletters

> offers advice on the relative desirability of investing in, among other things, stocks, Treasury bills, and money market funds, and describes generally the state of the market. It recommends particular stocks and groups of stocks for purchase or sale, discusses precious metals . . . . [Pet. App. at A5-A6].

The other newsletter "is typically somewhat more specific . . . with a brief introductory examination of general market trends followed by specific purchase, sale, and hold recommendations particularly for low-priced stocks." Pet. App. at A6. "No contention is made that any of the information published in [these newsletters] has been false or materially misleading." Pet. App. at A6. "Nor is it alleged" that petitioners have "profited through personal or corporate investments from the investment advice" published in the newsletter. Pet. App. at A6.

The Securities and Exchange Commission ("SEC") claims the power, under the Investment Advisers Act of 1940, to bar petitioners from publishing these newsletters. This claimed power derives solely from the

SEC's revocation of petitioner Lowe's registration as an investment adviser on the ground that Lowe had been convicted of crimes "'reflect[ing] a callous disregard' for the high fiduciary standards required of an investment adviser . . . [and] 'demonstrat[ing] his total lack of fitness to remain in "an occupation which can cause harm unless engaged in by those with appropriate background standards."'" Pet. App. at A4.

The court below upheld the SEC's claim against a First Amendment challenge by petitioners and held that petitioners' newsletters may not include "advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or holding specific securities." Pet. App. at A20. But the court qualified that holding in the following respects:

> [W]e note what this holding does not entail. Lowe is not prohibited from publishing or stating his views as to any matter of current interest, economic, or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely. He is not prohibited from publishing a newspaper of general interest and circulation. Nor is he prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer. [Pet. App. at A20].

Publications and other forms of expression analyzing the value of specific products or services and the advisability of purchasing those products or services have become an important part of our national discourse. Only recently, this Court had occasion to note that the magazine *Consumer Reports*, which is exclusively devoted to such analysis, "plainly would qualify . . . as

a 'media' defendant . . . under any conceivable definition of that term." *Bose Corp. v. Consumers Union*, —— U.S. ——, 104 S.Ct. 1949, 1955 n.8. Such publications are often limited to evaluating specific products and services in a particular market. Indeed, the various sectors of the investment market are subject to such analysis by a multiplicity of publications including financial or stock market columns in daily newspapers, business oriented newspapers or magazines such as *Barron's*, *Forbes*, *The Wall Street Journal*, television and radio programs such as *Wall Street Week*, and countless newsletters like petitioners' which may be differentiated from some of the more well-known financial publications largely by the size of their circulation.[1]

The notion that a person may be barred from engaging in this discourse on the basis of a prior criminal record appears on its face to strike at the core of the protection of free speech afforded by the First Amendment. And, while the Investment Advisers Act would not by its terms include many of the publications just discussed within the definition of "investment adviser" (see note 1, *supra*), the constitutional analysis applied by the court below could not be limited to publications like those of petitioners. As this Court has stated, "the chief purpose of the [First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713. "Any prior restraint on expression comes to this Court with a 'heavy

[1] The Investment Advisers Act provides the following exclusion from the definition of "investment adviser": "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a)(11). It is far from clear what constitutes a "business or financial publication of general and regular circulation" and whether petitioners' newsletters are within or without that category. We do not address that question in this brief, but instead assume for purposes of our analysis that the Act requires publishers of newsletters like those before the Court to register as investment advisers.

presumption' against its constitutional validity." *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419; see also *New York Times Co. v. United States*, 403 U.S. 713, 714; *Minneapolis Star & Tribune v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 583-584 n.6. Yet the court of appeals authorized a prior restraint on expression in the absence of any showing that might justify a prior restraint on free speech. See *Near*, 283 U.S. at 716.

The court below sought to justify its approval of the prior restraint here not on the ground that the expression being suppressed poses the kind of danger necessary to validate a prior restraint where fully protected expression may be involved; rather, that court sought to justify its holding on the ground that the expression being suppressed is entitled to a lesser degree of First Amendment protection.[2] The court below offered two alternative theories to sustain that conclusion: first, that the expression at issue is "commercial speech" and thus is not entitled to full First Amendment protection; second, that this case "involv[es] the permissible regulation of economic activity" (Pet. App. at A17)—specifically, "the regulation of a profession" (Pet. App. at A18)—and thus the expression here is outside the bounds of normal First Amendment mandates.

[2] Even if the court below were correct in this conclusion, and we devote the rest of this brief to showing it is not correct, it would not follow that an absolute bar would be permissible. In the regulation of obscenity, a form of expression which this Court has repeatedly held to be outside the protection of the First Amendment, this Court has required the most rigorous procedural safeguards before permitting prior restraint, because of the danger that protected speech might be caught up in the regulation. "[T]he freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66.

To a large degree, these theories implicate points that are also germane to the second question posed by this Court in the rehearing order in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18: "Whether, in a defamation action, the constitutional rule of New York Times and Gertz with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?" 52 LW 3937 (July 5, 1984). The AFL-CIO submitted an *amicus curiae* brief in *Dun & Bradstreet* that addresses these common points. We attach the pertinent pages from that brief as an appendix to the instant brief, and in part 1, *infra*, we briefly summarize the arguments made in those pages. In part 2, *infra*, we address the particular reasoning employed by the lower court here to support the second of the two theories described above.

1a. Petitioners' newsletters provide to subscribers information, analysis, and opinions respecting a variety of business entities. This material, as stated earlier, is akin to the substance of financial reports printed in major newspapers and magazines. Such expression has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385). Every case in which this Court has treated speech as "commercial speech" has involved purely commercial advertising or other methods of proposing a commercial transaction. And, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other pro-

posals for a commercial transaction, and not other kinds of speech:

> [C]ommercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.* [*Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 n.6].

Commercial speech, then, is the speech of producers of goods and services promoting their wares. That speech is "hardy" because it is fortified by the maker's knowledge of his own product and is activated by his desire to enhance his sales of that product and the attendant profits.

b. Aside from the "commercial speech" just discussed, this Court has never described a category of speech of a "commercial or economic nature" that is less deserving of First Amendment protection than other speech, and this Court's precedents leave no room for any such category.

Petitioners newsletters may be said to be economic in nature in two respects. The newsletters are prepared and published for sale at a profit, and thus for petitioner's ultimate economic benefit. And, the subject matter of the newsletters is fact and opinion concerning the relative merit of various investment alternatives. This Court's decisions affirm that neither of these factors is a basis for affording the newsletters diminished First Amendment protection. Thus, this Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the degree of First Amendment protection

afforded to his speech. *New York Times v. Sullivan*, 376 U.S. 254, 266. See also, *e.g.*, *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530; *First National Bank v. Bellotti*, 435 U.S. 765; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532. Similarly, the Court has made clear that speech relating to financial or economic matters is an important part of our national discourse, and deserving of full First Amendment protection. See, *e.g.*, *Thornhill*, 310 U.S. at 102-103; *Thomas*, 323 U.S. at 531-532.

Here, for example, facts and opinions concerning the relative worth of alternative investments help to determine the allocation of capital in our economy, which allocation is at the core of our economic system. The direction of our economy is a function of the combined effect of a multitude of individual investment decisions made by private citizens. It is critical that those decisions be informed by the free flow of information the First Amendment is intended to protect.

For a fuller discussion of these points, see the appendix hereto.

2. The second of the two alternative theories by which the court below upheld the prohibition on petitioners' speech is that the prohibition was pursuant to a valid economic regulation, the regulation or licensing of a profession, and is therefore not violative of the First Amendment. The lower court's assertion that the First Amendment does not prohibit the regulation of speech as part of the regulation of economic activity is based upon cases that stand for a much narrower proposition: "[T]he constitutional freedom for speech and press [does not extend] its immunity to speech or writing used as a *integral part of conduct* in violation of a valid . . . statute." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (emphasis added). Thus, if a bank robber accomplishes his wrong by passing a written note to a bank teller requesting that he be provided with the

bank's money, it does not violate the First Amendment either to prosecute the robber for his crime or to rely on the written note in the course of that prosecution. The cases relied upon by the court below are exclusively in this vein.[8]

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[8] The lower court (Pet. App. at A15) relied on a portion of the following passage from *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456:

> Moreover, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1969), *cert. denied*, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.

As the passage's quote from *Giboney* reveals, the cited cases were meant as examples of the general proposition illustrated by the bank robbery hypothetical described in text. *Giboney* involved coercive picketing that was intended to force an unlawful work stoppage which in turn was intended to force a wholesale distributor to discontinue doing business with non-union retailers, an objective that was unlawful under the state anti-trade restraint law. In *Texas Gulf Sulphur*, the "exchange of information about securities" was part of a transaction violative of the prohibitions against insider trading. In *Mills*, the "corporate proxy statements" were part of a scheme to mislead shareholders in violation of the Securities Exchange Act of 1934. In *American Column & Lumber Co.*, the "exchange of price and production information among competitors" was an integral part of a conspiracy in restraint of trade in viola-

That there are situations in which this rule should apply cannot be gainsaid. But it is equally true that if the rule is not appropriately confined, but rather is stretched to permit any government restriction of speech that is part of an otherwise valid economic regulation, the potential for governmental restriction of speech would be virtually limitless. Thus, when a First Amendment question is raised, the fact that the justification for restricting speech is an otherwise valid economic regulation is the *beginning*, not the end, of analysis. Were it otherwise, the state by its definition of illegal conduct could remove nearly any form of speech from the protection of the Constitution. As this Court stated in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844:

> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press

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tion of the Sherman Act. And, in *NLRB v. Gissel Packing Co.*, the "employer's threats of retaliation for the labor activities of employees" were part and parcel of an unlawful effort to coerce employees in their decision whether to join a union. See *Thomas v. Collins*, 323 U.S. 516, 537-38 ("When to [the employer's] persuasion other things are added which bring about coercion, or give it that character, the limit of the [First Amendment] right has been passed.")

In addition to the passage quoted from *Ohralik*, the lower court also cited (Pet. App. at A17-A18 n.6) the following cases: *Virginia State Board of Pharmacy, supra* (a commercial speech case); *Ohralik, supra* (a commercial speech case); *Young v. American Mini Theatres*, 427 U.S. 50, 62-63, n.18 (zoning requirements for "adult" theaters are "[r]easonable regulations of the time, place, and manner of protected speech"); *NLRB v. Retail Store Employees*, 447 U.S. 607, 616 (picketing in furtherance of an unlawful secondary boycott under the National Labor Relations Act).

> would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Here, for example, the government has defined the publication of newsletters by petitioners as a wrong. In this instance, the wrong has nothing to do with any alleged harm worked by those newsletters themselves. The *only* wrong is that in the view of the SEC, and the court below, by publishing these newsletters petitioner Lowe is practicing the profession of investment adviser after his license has been revoked. Indeed, others could publish the very same material without committing any wrong. Petitioner Lowe himself could publish the same material if he could publish or gain employment with a "bona fide" newspaper.

We do not doubt that the legislature may establish requirements for those who wish to practice much of what is done by investment advisers. To the extent that such advisers may in effect place themselves in a direct fiduciary relationship with their individual clients the reasons for requiring certain minimum standards are much the same as apply in other professions. *Cf., Ohralik*, 436 U.S. at 457.

But it does not follow that the legislature may precondition the right to publish, in the general marketplace of ideas, facts and opinions concerning the relative merit of specific investments. *If such expression is protected by the First Amendment, that expression does not lose that protection simply because the legislature defines publication of investment newsletters as part of the practice of an investment adviser and thereby claims the right to license the expression.*

The question thus becomes whether, consistent with the First Amendment, the government may require a license as a prerequisite to the opportunity to publish an investment newsletter. And, the answer to that question could not be more clear. The initial impetus for

what we now know as freedom of the press came in Seventeenth Century England in the struggle against licensing of the press. In *Lovell v. Griffin*, 303 U.S. 444, 451 (footnote omitted), this Court alluded to that history:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.

See also *Near v. Minnesota*, 283 U.S. at 713-714; *Grosjean v. American Press Co.*, 297 U.S. 245-246. As the Court in *Lovell* concluded, "it strikes at the very foundation of the freedom of the press [to] subject[] it to license and censorship." 303 U.S. at 451.

If a legislature sought by licensing to assure the qualifications of those who publish materials on the subjects of defense or foreign policy—subjects as to which accurate reporting is of critical importance to our society—no one would take seriously the contention that such regulation is constitutional as merely the licensing of professionals.

Nor, we submit, would the result be different if an attempt were made to require licensing of all reporters and commentators, including those who serve on daily newspapers or large magazines, who publish advice as to the merit of specific investment alternatives.

By the same token, the assertion here that the legislature may require licensing of those who publish newsletters of the type published by petitioners cannot be squared with the protections of the First Amendment.

"In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-785. The SEC's asserted power to license, and therefore to prohibit, petitioners' publication of their newsletters therefore violates the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit in this case should be reversed.

Respectfully submitted,

ROBERT M. WEINBERG
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

APPENDIX

APPENDIX

No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Vermont

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT M. WEINBERG
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

(2) The second question posed by the Court is whether the *Gertz* rule against presumed and punitive damages should apply "when the speech is of a commercial or economic nature." Order of July 5, 1984, —— U.S. ——, 52 L.W. 3937. It is our submission that the speech here is not "commercial speech" as this Court has defined that term and that, aside from "commercial speech," there should be no category of "speech of a commercial or economic nature" entitled to lesser First Amendment protection than other forms of speech.

(a) D&B provides its subscribers information on the financial status of business entities. The substance of D&B's reports is akin to the substance of the financial reports in *The New York Times* and *The Wall Street Journal*, or on the television program *Wall Street Week*. On its face then, D&B's speech is a part of the free interchange of information on matters of interest and concern regarding the functioning of the commercial sector of the society that the First Amendment is intended to protect.

D&B's speech has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385).

In *Chrestensen* the Court held "that the Constitution imposes no . . . restraint [based on a right of free speech] on government as respects purely commercial advertising." 316 U.S. at 54. *Virginia Pharmacy* revisited

that ruling and held that commercial advertising—a phrase the Court used interchangeably with the term "commercial speech" (e.g. 425 U.S. at 772 n.24)—is entitled to First Amendment protection, albeit to a lesser degree of protection than is afforded to other forms of speech. While *Virginia Pharmacy*, in other words, did alter the rule of constitutional law governing the "commercial speech" category, that case did not alter the scope of the category in a way that narrows the speech entitled to the full degree of First Amendment protection.

Every case since *Virginia Pharmacy* in which this Court has treated speech as "commercial speech" has involved purely commercial advertising or other methods of proposing a commercial transaction.[7] And, the Court has continued to use the terms "commercial speech" and "purely commercial advertising" as synonymous[8] and

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[7] *Bolger v. Young Drug Products Corp.*, —— U.S. ——, 103 S.Ct. 2875 (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (advertising legal services); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (advertising on billboards); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (advertising electrical power); *Friedman v. Rogers*, 440 U.S. 1 (use of trade name in advertising optometric services); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (proposal to provide legal services for profit); *Bates v. State Bar of Arizona*, 433 U.S. 350 (advertising legal services); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (advertising houses). See also, the pre-*Virginia Pharmacy* cases discussing the doctrine of commercial speech. *Bigelow v. Virginia*, 421 U.S. 809 (adversing abortions); *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (advertising jobs).

[8] *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Bates v. State Bar of Arizona*, 433 U.S. at 364 ("Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services . . . .").

has repeatedly defined the concept of "commercial speech" as "speech proposing a commercial transaction."[9] Moreover, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other proposals for a commercial transaction, and not other kinds of speech. The Court in *Central Hudson*, 447 U.S. at 564 n.6, succinctly summarized that rationale:

> In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co. v. Public Service Comm'n*, [447 U.S. 530,] 537-540. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

Commercial speech, then, is the speech of producers of goods and services promoting their wares. That speech is "hardy" because it is fortified by the maker's knowledge of his own product and is activated by his desire to enhance sales of that product and the attendant profits.

A comparison of *Central Hudson* and its companion case *Consolidated Edison Co.* (cited in the above-quoted passage), helps to put the foregoing in concrete terms. *Central Hudson* concerned advertising by an electric utility to "promote the use of electricity" (447 U.S. at 558), the utility's product. Those advertisements were deemed by the Court to be "commercial speech," and

[9] See, *e.g.*, *Bolger*, 103 S.Ct. at 2880; *Metromedia*, 453 U.S. at 505-506; *Central Hudson*, 447 U.S. at 562; *Friedman*, 440 U.S. at 11.

analyzed accordingly. *Consolidated Edison*, concerned materials circulated by an electric utility to extol the "benefits of nuclear power" (447 U.S. at 532), a matter of the most direct economic interest to the utility. But even though Consolidated Edison's ultimate objective was to enhance its profit making opportunities, the Court did *not* treat its materials as commercial speech but rather as speech entitled to full First Amendment protection. The Court explained that the speech in *Consolidated Edison* was "a direct[] comment on a public issue" while that in *Central Hudson* was "advertising 'clearly intended to promote sales' " and therefore speech "in the context of [a] commercial transaction[]." 447 U.S. at 563 n.5.[10] And the Court added "the failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.' " *Id.* quoting *Ohralik*, 436 U.S. at 456.

D&B's reports at issue here are not purely commercial advertisements for some underlying good or service or a proposal to buy or sell such a product. And, D&B, like any other reporter or commentator on financial matters, was commenting not on its own internal operations but on those of a third person as to whom D&B had no inherent knowledge. Moreover, like most reporters and commentators, D&B was activated by its desire to sell its publication not by the advertiser's desire to capitalize on its production of an underlying good or service. Thus, D&B's speech is not "commercial speech."

(b) As noted at the outset, the second question posed by the Court inquires about the relevance to proper application of the *Gertz* test of the fact that speech is "commercial or economic in nature." Aside from the "commercial speech" just discussed this Court has never

[10] See also, *Friedman*, 440 U.S. at 11 and n.10; *Bolger*, 103 S.Ct. at 2880-2881.

described a category of speech "of a commercial or economic nature" less deserving of First Amendment protection than other speech, and we submit that this Court's precedents leave no room for any such category.

D&B's reports are commercial and economic in nature in that the reports are prepared and published for sale at a profit, and thus for D&B's ultimate economic benefit, and in that the subject matter of the reports is the financial condition of business entities. Neither of these factors is a basis for affording the reports diminished First Amendment protection.

This Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the degree of First Amendment protection afforded to his speech. Thus, in *New York Times v. Sullivan*, 376 U.S. at 266, the Court in affording full protection to that newspaper stated: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." See also, *e.g.*, *Consolidated Edison*; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532. It therefore suffices to say that if the fact that D&B's reports are sold for profit makes those reports "economic speech" subject to a lesser degree of First Amendment protection, then *The New York Times* and *The Wall Street Journal* in their entirety would also be economic speech subject to such lesser protection.

Similarly, the fact that D&B's reports concern business finances—the other respect in which the reports are "commercial or economic in nature"—cannot be a basis for diminished First Amendment protection. To so conclude, would be to subject the financial section of *The New York Times* and most of *The Wall Street Journal* to lesser First Amendment protection than the balance of those newspapers. The same adverse consequence would

be visited on publications like *Consumers Reports*, which evaluate commercial products. But speech relating to financial or economic matters, private as well as public, is an important part of our national discourse. In a free enterprise economy such matters as the financial standing of a company or the quality of its products are of great public interest. This Court has never suggested, or countenanced, a view of the First Amendment that would afford less protection to speech on such subjects. To the contrary, in *Thornhill v. Alabama*, 310 U.S. at 102-103, the Court stated:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147, 155, 162-63. See *Senn v. Tile Layers Union*, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

See also *Thomas v. Collins*, 323 U.S. at 531-532.

What the Court said in the labor relations context applies equally to all other aspects of our commercial system. For example, the reporting of facts indicating the impending collapse of a bank or disclosing that a particular corporation has suffered large losses or has filed a petition in bankruptcy are as important to the course of our society as the range of reporting on private individuals assuredly protected by the *Gertz* rule. There is, accordingly, no warrant for extending a lesser degree of protection to speech on commercial or economic subjects than to speech on other subjects.

No. 83-1911

(13)

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IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS

MICHAEL E. SCHOEMAN
SCHOEMAN, MARSH, UPDIKE & WELT
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Counsel for Petitioners

Of Counsel:
MICHAEL P. RICHMAN

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58 pp

Questions Presented

1. Under the First Amendment, may a court permanently enjoin a publisher from publishing information and opinions about publicly traded securities on the ground that the publisher is not registered under the Investment Advisers Act of 1940?

2. Do the registration provisions of the Investment Advisers Act of 1940, permitting denial or revocation of registration on the ground of prior misconduct, constitute an unconstitutional prior restraint under the First Amendment on the rights of publishers to publish information and opinions about publicly traded securities?

3. Does the exemption in the Investment Advisers Act of 1940 for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" unconstitutionally discriminate under the First Amendment, or under the principles of equal protection of the laws incorporated in the due process clause of the Fifth Amendment, against publishers of non-exempt publications?

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No. 83-1911

IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS

Opinions Below

The citations for the opinions of the courts below are *SEC* v. *Lowe,* 725 F.2d 892 (2d Cir. 1984) and *SEC* v. *Lowe,* 556 F. Supp. 1359 (E.D.N.Y. 1983). These opinions are reproduced in the appendix to the petition for certiorari at A1 and A41, respectively.

Ground Upon Which This Court's Jurisdiction Is Invoked

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the court of appeals was entered January 18, 1984, a timely petition for rehearing was denied by the court of appeals on February 22, 1984, and the petition for a writ of certiorari was filed in this Court on May 16, 1984. The petition was granted by this Court by order dated October 1, 1984.

Constitutional Provisions

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

The following sections of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* (the "Act"), are reproduced in the appendix to the petition for certiorari at A68: section 202(a)(11), 15 U.S.C. § 80b-2(a)(11) (defining "investment adviser"); section 203(a), 15 U.S.C. § 80b-3(a) (requiring registration); section 203(e), 15 U.S.C. § 80b-3(e) (specifying the procedure for registration); section 203(e), 15 U.S.C. § 80b-3(e) (providing for censure, denial, suspension or revocation of registration); section 203(f), 15 U.S.C. § 80b-3(f) (providing for sanctions against associates of investment advisers) and section 209(e), 15 U.S.C. § 80b-9(e) (providing for injunctions against violations).

As defined in section 202(a)(11), 15 U.S.C. § 80b-2(a)(11),

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly, or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; . . . .*

Section 203(a), 15 U.S.C. § 80b-3(a), makes it unlawful for any investment adviser, unless registered under section 203, to make use of the mails or any means or instrumen-

* The definition also contains exclusions from the definition for bankers, lawyers, accountants, brokers and others.

tality of interstate commerce in connection with his or its business as an investment adviser.*

Section 203(e), 15 U.S.C. § 80b-3(e), provides, *inter alia*, for suspension or revocation of a registration if the Commission finds that such action is in the public interest and that certain prior misconduct has occurred.

> The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that . . . [such action] is in the public interest . . .

and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated has engaged in specified misconduct, or is subject to certain types of injunctions or orders. *Id.* Each of these events or conditions is referred to as a "disqualification" in section 203(c)(1)(G), 15 U.S.C. § 80b-3(c)(1)(G).

The "disqualification[s]" include that the adviser or any person associated with the adviser, has been convicted within ten years preceding the filing of the application or at any time thereafter, of any of a broad range of felonies or misdemeanors. Section 203(e), 15 U.S.C. § 80b-3(e).**

* Exceptions provided for in Section 203(a) are not relevant. *See* section 203(b), 15 U.S.C. § 80b-3(b).

** The "disqualifications" also include that the adviser or associated person has willfully violated any provision of the federal securities laws "or is unable to comply with any such provision," or that he is subject to a permanent or temporary injunction against acting as an investment adviser or investment broker, dealer or municipal securities dealer. *Id.*

Denial of registration is provided for in section 203(d), 15 U.S.C. § 80b-3(d). That section states that "[t]he Commission shall deny such registration . . . if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section." The Commission's authority to order that a person not be associated with an investment adviser is provided in section 203(f), 15 U.S.C. § 80b-3(f). Section 209(e), 15 U.S.C. § 80b-9(e), provides the Commission with authority to obtain injunctive relief against violations of the Act. Section 217, 15 U.S.C. § 80b-17, provides criminal penalties, including up to 5 years imprisonment, for willful violation of any provision of the Act or any rule, regulation or order of the Commission thereunder.

Legislative History

As enacted in August 1940, the Act was title II of H.R. 10065, 76th Cong., 3d Sess., 54 Stat. 847 (1940). Title I of the bill was the Investment Company Act of 1940, 54 Stat. 789 (1940), codified at 15 U.S.C. §§ 80a-1 *et seq.* Enactment followed publication by the Commission of *Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission (1939)*, (the *"Commission Report"*), a report made pursuant to section 30 of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 827 (1935).* One of the related supplemental reports issued by the Commission pertained to investment counsellors and advisers (the *"Supplemental Report"*).** Following publication of the *Commission Report* and the *Supplemental*

* 15 U.S.C. § 79z-4.

** *Investment Counsel, Investment Management, Investment Supervisory and Investment Advisory Services*, H.R. Doc. 477, 76th Cong., 2d Sess. (1939).

Report, companion bills to regulate investment trusts, investment companies and investment counsellors were introduced in the House and Senate in March 1940, and hearings were held before a subcommittee of the Senate Committee on Banking and Currency in April 1940 and before a subcommittee of the House Committee on Interstate and Foreign Commerce in June 1940.*

The *Commission Report*, the *Supplemental Report* and the legislative proceedings related primarily to investment trusts, investment companies and investment counsellors rendering personal advice to clients, and contained few references to publishers. The paucity of legislative history pertaining to publishers has previously been indicated by the Court. *See SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 187 n. 15 (1963). At one point, however, the *Supplemental Report* reflected concern with the exaggerated advertising of some organizations that apparently included publishers, and indicated that phrases used in their advertisements disclosed the " 'tipster' character of their services." *Supplemental Report*, p. 21. The *Supplemental Report* cited "advertisements which emphasized 'cheap stocks for large profits,' 'trading advice,' 'stocks at $2' and so forth. . . ." *Id.* *See also id.* at p. 27. Examples of these advertisements appeared in Appendix E to the *Supplemental Report*.

The House subcommittee report on H.R. 10065 described the purpose of the Act:

* *Hearings on Investment Trusts and Investment Companies, H.R. 10065, Subcommittee of the House Committee on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. (1940) and *Hearings on Investment Trusts and Investment Companies, S. 3580* [the Senate predecessor of H.R. 10065], *Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. (1940).

> The essential purpose of title II of the bill is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and safeguard the honest investment adviser against the stigma of the activities of these individuals by making fraudulent practices by investment advisers unlawful. The title also recognizes the personalized character of the services of investment advisers and especial care has been taken in the drafting of the bill to respect this relationship between investment advisers and their clients.

H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940). Similar language appears in the earlier Senate Committee Report, S. Rep. No. 1775, 76th Cong., 3d Sess. 21-22 (1940).

As originally enacted, the Act provided that the Commission could revoke the registration of an investment adviser, in the public interest, on the ground of prior convictions involving the purchase or sale of any security or arising out of securities activities or the granting of an injunction against acting as a securities professional. 54 Stat. 847, 851 (1940). These original "disqualification[s]" are now contained in sections 203(e)(2)(B) and 203(e)(3), 15 U.S.C. 80b-3(e)(2)(B) and 15 U.S.C. 80b-3(e)(3). Amendments to the Act in 1960, 1970 and 1975* expanded the grounds for revocation and also provided for remedies alternative to revocation, such as suspension and censure. These changes were intended to strengthen disciplinary controls and to conform these remedial provisions of the Act to similar provisions of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, with respect to brokers and dealers. *See* H.R. Rep. No. 2179, 86th Cong., 2d Sess. 4-5 (1960) and H.R. Rep. No. 123, 94th Cong., 1st Sess. 89 (1975).

* Pub. Law 86-750, 74 Stat. 885; Pub. Law 91-547, 84 Stat. 1431; and Pub. Law 94-29, 89 Stat. 167.

Statement of the Case

The court of appeals held that petitioners should be permanently enjoined from publishing information and opinion about the value of, or the advisability of investing in, securities because petitioners are not registered under the Investment Advisers Act of 1940 (the "Act").

Petitioners are publishers of investment newsletters. Lowe Management Corporation publishes the *Lowe Investment & Financial Letter* (hereinafter referred to as the "*Lowe Letter*") and the *Lowe Stock Advisory* (JA7).* Lowe Stock Chart Service, Inc. has announced its intention to publish, but has not yet published, the *Lowe Stock Chart Service* (JA32-33). Christopher L. Lowe is the President of Lowe Management Corporation and Lowe Stock Chart Service, Inc. and is the Research Chairman and Editor of the three publications (JA7).**

Petitioners' only activity is publishing. Petitioners are not alleged to be engaged in selling or buying, or offering to sell or buy, securities or other investments and are not alleged to have any interest in any of the securities or other investments that they describe or comment on (JA5-26). Petitioners are not alleged to be rendering personal advice to individual investors (JA5-26).

The newsletters primarily contain news about investment markets and the movement of market indicators, and the forces affecting those markets. The newsletters also

* JA refers to the joint appendix.

** The corporate petitioners have no corporate parents or subsidiaries and have no corporate affiliates except each other.

contain factual information and the publishers' opinion about the value and desirability of specific publicly traded securities and other forms of investment.

An example of petitioners' newsletters is the eight-page issue of the *Lowe Letter* dated December 11, 1981 (JA 78). It contains a one-page news article reporting on market conditions and stating the market outlook. That is followed by nearly two pages of reports and evaluations on the movement of 29 market indicators. After that appear nearly three pages of news and evaluations of trading patterns of 21 groups of stocks and specific evaluations (both favorable and unfavorable) of stocks within some of these groups. Lastly, the newsletter contains two pages of news and evaluation of gold, silver and shares of gold mining companies.

The newsletters are distributed by mail to subscribers. (JA32). The *Lowe Letter* has approximately 5,000 subscribers and the *Lowe Stock Advisory* has approximately 600 subscribers (JA31-32). Distribution of the two newsletters, prior to the trial, was irregular: two issues of the *Lowe Letter* were published in 1981 and five were published in 1982, and four issues of the *Lowe Stock Advisory* were published in 1981 (JA32).

Prior to May 1981, Lowe Management Corporation had been a registered investment adviser and had been engaged in rendering personal investment advice in addition to publishing investment newsletters (JA8). On May 11, 1981, respondent Securities and Exchange Commission (the "Commission"), acting under sections 203(e) and 203(f) of the Act, 15 U.S.C. § 80b-3(e) and § 80b-3(f), revoked

Lowe Management Corporation's registration as an investment adviser and ordered that Christopher Lowe be barred from association with any investment adviser (JA64). The Commission based its action on its finding that Christopher Lowe had been convicted in 1977 and 1978 of two felony and two misdemeanor counts,* and upon its determination that such action woud be "in the public interest." *Id.*

After the Commission's order, petitioners continued only their publishing activity and on June 6, 1982, the Commission filed a complaint against them in the United States District Court for the Eastern District of New York (JA5-32). The complaint sought to enjoin petitioners from continuing to publish their newsletters and to require them to disgorge all monies or proceeds received in connection with their publishing business since the date of the Commission's order (JA23-26).

The complaint asserted that petitioners were publishing their newsletters in violation of section 203(a) of the Act, 15 U.S.C. § 80b-3(a), and the Commission's order because they were not registered under the Act as investment advisers (JA18-23). The complaint did not assert that any of the information reported or opinions expressed in petitioners' publications was fraudulent or misleading or that

* In 1977, Lowe had been convicted in New York on two misdemeanor counts for violations of N.Y. Gen. Bus. Law §§ 352-c and 359-eee, for misappropriation of funds and failure to register as an investment adviser (JA9). In 1978, he had been convicted in New York on two felony counts for tampering with physical evidence and grand larceny in the third degree (JA10). Subsequently, in 1982, Lowe was convicted in New Jersey on two counts of theft by deception in the third degree (JA74-77). None of these convictions arose out of petitioners' publishing activities and none was related to the information or opinions expressed in the newsletters.

petitioners owned, or profited through ownership of, securities referred to in the newsletters.*

After a trial before Chief Judge Jack B. Weinstein on September 13, 1982, the district court dismissed the portions of the complaint seeking to enjoin petitioners' publishing activities and seeking disgorgement. The district court held that the petitioners' newsletters constituted pure First Amendment speech and noted the heavy presumption against the constitutional validity of a system of prior restraints. 556 F. Supp. at 1367. The district court further held that even if the publications were assumed to be "commercial speech," the sanction of future prohibition against publishing the newsletters was excessive and would be invalid under the First Amendment. 556 F. Supp. at 1366. Rather than adopt an interpretation that might collide with the guarantees of the First Amendment, the district court construed the Act so as to delete, except in very limited circumstances, the Commission's discretion to deny or revoke registration of publishers and other persons rendering impersonal investment advice. 556 F. Supp. at 1368-69.

A divided court of appeals reversed in a 2-1 decision rendered January 18, 1984 and held that petitioners should be prohibited from "selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." 725 F.2d at 902. The

* Two additional counts in the complaint asserted that petitioners' failure to disclose Christopher Lowe's convictions and the Commission's order to their readers violated the antifraud sections of section 206(a)(1) and 206(a)(2) of the Act, 15 U.S.C. §§ 80b-6(a)(1) and (2) (JA19-22). These counts were dismissed by the district court. 556 F. Supp. at 1370-71. They were not discussed by the court of appeals and are not at issue in this Court.

majority opinion found that petitioners' publications were the kind of commercial activity whose regulation is permitted by the First Amendment and it analogized the Act's licensing requirements, as applied to publishers, to the licensing of professionals. 725 F.2d at 900-01. Alternatively, it found that petitioners' publications were "potentially deceptive commercial speech" and therefore subject to regulation. *Id.* The majority opinion said, however, that Christopher Lowe would not be prohibited "from publishing recommendations in somebody else's bona fide newspaper as an employee, editor or writer." 725 F.2d at 902.

The dissenting judge would have affirmed the district court's judgment. 725 F.2d at 910. The dissenting opinion said that publications such as the petitioners' enjoy full First Amendment protection at least so far as prior restraint is concerned and that they do not constitute commercial speech. 725 F.2d at 906. It referred to the heavy presumption against the constitutional validity of prior restraints and said that "the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers." 725 F.2d at 907-08.

Summary of Argument

As applied to publishers, the registration requirements of the Act violate the most fundamental of First Amendment principles by imposing a prior restraint in the form of a discretionary licensing system. Any system of prior restraint bears a heavy presumption against its constitutional validity, and licensing of the press is one of the most objectionable systems of prior restraint.

The Act's licensing standards, which are based on prior misconduct of the publisher and broad discretion of the Commission, fail to assure that constitutionally protected material is not suppressed. Prior misconduct of a publisher is not a proper standard for denial of the right to publish, because there is no necessary connection between prior misconduct and the contents of a future publication. In this case, notwithstanding petitioner Christopher Lowe's prior criminal convictions, the investment information and opinion published in his newsletters were not found, or even alleged to be, fraudulent or misleading.

Moreover, the Commission has impermissibly broad discretion to deny or revoke a publisher's license. After finding past misconduct, the Commission need only find that denial or revocation is "in the public interest." Such a standard is not sufficiently objective or definite under the First Amendment to assure that constitutionally protected materials will remain protected. And no constitutionally required procedural safeguards are provided. The Act does not require any judicial determination, or even any administrative determination, that the material being suppressed is constitutionally unprotected.

Information and opinion about securities or other products available to the public, when published by a disinterested publisher, are fully protected by the First Amendment. Such information and opinion serve an important societal function; but even if they did not, the government may not prohibit public discussion about any subject of legitimate public interest. Segregating investment information and opinion as a subject on which people may not publish unless they obtain a license from the Commission

violates the First Amendment's requirement of content neutrality.

Publication by the press of investment information is pure First Amendment speech, not "commercial activity" that would allow the government to license publishers. The power to regulate commercial activity generally has never given the government a right to subject the press to discretionary licensing. Calling petitioners' newsletters "commercial activity" entirely ignores that they are publications. Publishing is not a subordinate component of petitioners' activity; it is the only activity in which they are engaged.

Petitioners' publications are not "commercial speech." They are not "expression related solely to the economic interests of the speaker and its audience." Petitioners have no direct or indirect economic interest in the securities they discuss or in whether the reader buys, sells or does nothing. Petitioners' expression relates to the economic interests not of themselves and their readers, but to the economic interests of their readers and third parties buying and selling securities and of the public in general.

Nor are petitioners' publications "speech which does no more than propose a commercial transaction." Petitioners do not propose securities transactions. They only publish information and opinion (favorable and unfavorable) on securities that may be proposed for purchase or sale *by others*. And even if petitioners' publications were classified as commercial speech, petitioners' publications have not been shown to be deceptive or even likely to be deceptive. *Complete suppression* of petitioners' disinterested publishing of investment information is far more extensive than necessary to further any legitimate state interest.

Finally, the Act unconditionally discriminates against newsletter publishers by excluding from the definition of investment adviser, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Under the Act, a newspaper is free to publish news and opinions about stocks. If Christopher Lowe publishes the *identical* news and opinion, he must obtain a license, failing which he can be *imprisoned* merely for the act of unlicensed publishing. Freedom of the press, however, applies equally to all publishers and it is intolerable under the First Amendment, and the due process clause of the Fifth Amendment, for Congress to discriminate against one segment of the press.

ARGUMENT

I.

The Registration Requirements of the Act, and the Injunction Mandated by the Court of Appeals, are Unconstitutional Prior Restraints on Freedom of the Press and Freedom of Speech.

As applied to publishers, the registration requirements of the Act violate the most fundamental of First Amendment principles by imposing a prior restraint in the form of a discretionary licensing system. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976).

Although prior restraints are not unconstitutional *per se*, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971).

Licensing of the press, where the right to publish depends on obtaining permission from the licensor, is one of the most objectionable systems of prior restraint.

> "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

Members of the City Council v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2124 n. 13 (1984) (quoting *Lovell* v. *Griffin*, 303 U.S. 444, 451-52 (1938) (footnote omitted)). *See also Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931).

The Court has been particularly concerned to assure that prior restraints of First Amendment activity, and especially licensing, even where permitted, do not result in the suppression of constitutionally protected speech. "Where government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling interest." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 (1980). If the restriction involves licensing, in order to assure that protected First Amendment activity is not suppressed, the licensor must have narrow, objective and definite standards, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969), and the licensing statute must provide strong procedural safeguards, *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*.

The Act's licensing standards are not precisely drawn or appropriately limited, because they fail to assure that constitutionally protected speech is not suppressed. The Act provides for licensing based on the past acts of the publisher and the discretion of the Commission, not on whether the publication itself is or is not protected. Assuming, *arguendo*, that prevention of fraud might be a compelling state interest justifying licensing, *but see Village of Schaumberg* v. *Citizen for a Better Environment*, 444 U.S. 620, 637 (1980), and *Schneider* v. *State*, 308 U.S. 147, 164 (1939), under the Act publication of investment information and opinion may be totally suppressed without regard to whether it *is* truthful or fraudulent. The Act authorizes the Commission to deny or revoke a registration not upon a determination that particular material is constitutionally unprotected, but merely upon a finding of specified prior misconduct of the publisher and a discretionary determination by the Commission that revocation or denial would be "in the public interest." *See* section 203(e), 15 U.S.C. § 80b-3(e).

Prior misconduct is not a proper standard for the denial of freedom of speech, even where the misconduct involves

prior abuse of that right. *Near* v. *Minnesota, supra* (invalidating injunction against future publishing of defamatory material notwithstanding prior publication of defamatory material); *Gayety Theatres, Inc.* v. *Miami,* 719 F.2d 1550 (11th Cir. 1983) (voiding theatre licensing); *Entertainment Concepts, Inc.* v. *Maciejewski,* 631 F.2d 497, 506 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981) (voiding motion picture licensing); *Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980) (voiding theatre licensing); *Perrine* v. *Municipal Court,* 5 Cal. 3d 656, 488 P.2d 648 (1971), *cert. denied,* 404 U.S. 1038 (1972) (voiding bookstore licensing).*

Prior misconduct is an improper standard because there is no necessary connection between prior misconduct and the contents of a future publication. Christopher Lowe, for example, was convicted of serious crimes including third degree grand larceny, but there is no suggestion that any of the investment information or opinion published in his newsletters is or has ever been fraudulent or misleading. The Act is particularly offensive in that the range of specified prior misconduct is very broad, including such crimes as burglary, arson, larceny and mail fraud relating back for a period of ten years preceding the application. *See* section 203(e), 15 U.S.C. § 80b-3(e).

If the government fears that a publisher will abuse his First Amendment rights, it can monitor that person's activity and, if wrongdoing is committed, may punish such wrongdoing. What it cannot do consistently with the

* Twenty-two additional federal and state cases invalidating, and four cases upholding, licensing schemes based on past misconduct are cited in *Cornflower,* 485 F. Supp. at 785-86.

heavy presumption against prior restraint is prohibit the future exercise of those rights based on past violations. If the Commission, based on Christopher Lowe's past misconduct, fears that he may commit fraud using his publications, it may read the publications and if it believes a fraud has been committed, may seek to punish him for that fraud. But it has no constitutional authority to prohibit future publication in the mere anticipation that a fraud may be committed.*

The right to publish despite past misconduct is a corollary of the principle that the First Amendment bars the government from selecting who may and who may not speak. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'" *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 790-91 (1978) (quoting *Buckley* v. *Valeo,* 424 U.S. 1 at 48-49 (1976)). The Commission may not determine that Lowe or any other particular person is not fit to engage in publishing. Under the First Amendment everyone is fit to publish. *Bellotti.*

The Act also leaves an impermissible degree of discretion in the Commission to deny or revoke a publisher's license. After a finding of specified misconduct, the Commission has full discretion limited only by a requirement that it find its own action to be in "the public interest," a standard that presumably guides every public official. Such a standard is not sufficiently objective or definite under the First Amendment to assure that constitutionally

* The Commission made no finding as to the likelihood that petitioners will commit fraud through the use of their publications.

protected materials will remain protected. *See, e.g., Shuttlesworth* v. *City of Birmingham, supra* (licensing system for parade permits held to be unconstitutionally broad where based on standard of whether the public welfare, peace, safety, health, decency, good order, morals or convenience requires that the permit be refused).

As stated in *Shuttlesworth*,

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *City of Baxley*, 355 U.S. 313, 322.

394 U.S. at 151. *See also Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 97 (1972).

The Act also fails to provide constitutionally required procedural safeguards. In *Southeastern Promotions, Ltd.* v. *Conrad, supra*, the Court stressed that to avoid constitutional invalidity, a system of prior restraint must not only fit within one of the narrowly defined exceptions to the prohibition against prior restraints, it must also have been accomplished with necessary procedural safeguards against suppressing constitutionally protected speech. *Id.* at 559.

> We held in *Freedman* [*Freedman* v. *Maryland*, 380 U.S. 51 (1961)], and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of

> instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Id. at 560.

The Act, however, does not require any showing that the *material* is unprotected. It merely requires a showing that the publisher of the material has engaged in prior misconduct. And the Act does not require the Commission to institute judicial proceedings. The restraint imposed by its discretionary denial of the license is permanent and no final judicial determination is necessary.

Finally, even if the Act were a proper narrowly drafted licensing statute, the courts below could still not enjoin petitioners' unlicensed publication in advance. *See Near* v. *Minnesota, supra; New York Times Co.* v. *United States, supra.* As stated in *Southeastern Promotions*,

> The presumption against prior restraint is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

420 U.S. at 558-59.

II.

Licensing and Enjoining Petitioners' Publications Are Not Valid Subject Matter Regulations.

A. The Information and Opinions Petitioners Publish About Securities Are Fully Protected Against Prior Restraint by the First Amendment.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. *Alabama,* 310 U.S. 88, 102 (1940).

In a complex economic society, information and opinion about products available to the public, including financial products such as securities, are necessary and appropriate to enable the members of society to cope with the exigencies of their period.

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensible. See *Dun & Bradstreet, Inc.*

> *v. Grove,* 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of certiorari). See also, *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring). And if it is indispensible to the proper allocation of resources in a free enterprise system, it is also indispensible to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia Pharmacy Board v. *Virginia Citizens Council,* 425 U.S. 748, 765 (1976) (footnotes omitted).* *See also Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561-62 (1980).

Even apart from this Court's recognition, in the context of commercial speech cases, of the societal importance of commercial information, petitioners have a right to publish their views on the value of securities as much as on any other subject. Constitutional protection does not turn upon the social utility of the ideas and beliefs which are offered. *NAACP* v. *Button,* 371 U.S. 415, 444-45 (1963). The Court has repeatedly emphasized that government may not prohibit discussion about any subject of legitimate public interest. *E.g., Police Department of Chicago* v. *Mosley*:

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* The Court also stressed that:

> As to the particular consumer's interaction in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in today's most urgent political debate.
>
> * * *
>
> Generalizing, society may also have a strong interest in the free flow of commercial information.

Id. at 562.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content . . . To permit the continued building of our politics and culture, and to ensure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.

408 U.S. at 95-96.

The First Amendment does not protect speech only to the extent it can be characterized as political and the rights of free speech and free press are not confined to any field of human interest. *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217, 223 (1967); *Thomas* v. *Collins,* 323 U.S. 516, 531 (1945). As stated in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 (1978): "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak. . . ."

As Chief Justice Hughes said in *Near* v. *Minnesota, supra,* at 713-14 (quoting Blackstone, 4 COMMENTARIES 151-52):

> *Every free man has an undoubted right to lay what sentiments he pleases before the public;* to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

(Emphasis added).

Congress may not single out a particular topic of legitimate public interest to be subject to licensing. "The First Amendment's hostility to content based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic."

Carey v. *Brown,* 447 U.S. 455, 462 (1980) (quoting *Consolidated Edison Co.* v. *Public Service Commission,* 447 U.S. 530, 537 (1980)). In *Carey* v. *Brown* and *Police Department of Chicago* v. *Mosley,* the Court invalidated anti-picketing ordinances that exempted the subject of labor disputes. In *Consolidated Edison,* the court invalidated a regulation that barred utilities from publishing opinion on the subject of nuclear power. Content neutrality prohibits the government from discriminating on the basis of the content of the message. *Regan* v. *Time, Inc.,* 104 S. Ct. 3262, 3267 (1984).

The Act unconstitutionally violates content neutrality by segregating investment information and opinion as a subject on which people may not publish unless they are exempt or obtain a license. The legislature has no power to declare such a subject, which is a matter of legitimate public interest, to be off-limits to publishers.

Judge Brieant's view was therefore correct when he stated, in dissent below:

> We address here not the power to regulate, or punish fraud after publication, but the power to impose prior restraint. Investment opinion, in my opinion, is as much speech protected from prior restraint as is political opinion, philosophy or gibberish.

725 F.2d at 907.

B. Petitioners' Publishing Is Not "Commercial Activity" Subject to Licensing.

The registration requirements of the Act as applied to petitioners and other publishers are not, as the court of appeals held, "the kind of regulation of commercial activity permissible under the First Amendment." 725 F.2d at 900.

The power to regulate commercial activity generally has never given the government a right to subject the press to discretionary licensing. Publications do not lose their First Amendment protection against prior restraint by being characterized as something else. *See Near* v. *Minnesota,* 283 U.S. at 720: "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." Similarly, characterizing a newsletter as "commercial activity," and *thereby entirely ignoring that it is a publication,* does not allow the government to require the publisher to obtain a license to publish.

Nothing in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 150 (1967) or *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 456 (1978), on which the court of appeals principally relied, 725 F.2d at 899-901, implies a governmental power to license the press. The plurality opinion in *Curtis Publishing* noted, as the court of appeals said, that the press is not immune from general business regulation. But *Curtis Publishing* also stressed that the founding fathers "firmly adhered to the proposition that the 'true liberty of the press' permitted 'every man to publish his opinion,' " and that while protected activity may in some respect be subject to sanctions, it is not open to all forms of regulation. 388 U.S. at 149-50 (citation omitted). The Court said:

> Our touchstones are that acceptable limitations must neither affect "the impartial distribution of news" and ideas, nor because of their history or impact constitute a special burden on the press, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

388 U.S. at 150-51 (citations omitted). Discretionary licensing of the press under the guise of licensing "commercial activity" plainly falls outside those limitations.

The excerpt from *Ohralik* relied on by the court of appeals only acknowledges government's power to regulate communications about commercial transactions by the participants in those transactions where speech is a "subordinate component" of their activity. *See Ohralik* at 457.

In *Ohralik,* the Court referred to:

> [n]umerous examples . . . of communication that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

436 U.S. at 456, *quoted at* 725 F.2d at 899.

Petitioners do not dispute the power of government to regulate insider trading, corporate communications with shareholders about a proposed merger, information exchanges among manufacturers, and threats by employers to their employees during labor disputes. But that power in no way limits the right of the press, free of prior restraint, to write about such events or their effect on the value of the securities of the companies involved. That a Texas Gulf Sulphur Company officer must disclose inside informa-

tion before trading doesn't mean that a disinterested publisher needs a federal license to write about Texas Gulf Sulphur Company or the worth of its shares.

Petitioners' publishing is not a "subordinate component" of petitioners' activity. It is the *only* activity in which they are engaged.

Nor can licensing of investment publishers be justified by comparing it, as the court of appeals did, to the licensing of professionals. *See* 725 F.2d at 901. The difference between the publisher and the licensable professional is that the publisher publishes impersonal advice available to the world at large, and thereby contributes directly to public discussion. In contrast, the licensable professional renders personal, and private, advice to individual clients for their particular needs.

The difference between the publisher and the licensable professional is exemplified by *New York County Lawyers Association* v. *Dacey*, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967), *reversing* 28 A.D.2d 161, 283 N.Y.S.2d 984 (1st Dept.). There the court refused to enjoin publication of the book *How to Avoid Probate!* and rejected the contention that the author and his publishers and book sellers were engaged in the unauthorized practice of law. Even though some of Dacey's readers might rely on his published advice, Dacey was not involved in the "representation and advising of a particular person in a particular situation," 28 A.D.2d at 174, 283 N.Y.S.2d at 998 (dissent), but was rather engaged in the exercise of First Amendment rights.*

* *Compare Grievance Committee* v. *Dacey*, 154 Conn. 129, 222 A.2d 339 (1966), *app. denied*, 386 U.S. 683 (1967), where Dacey was enjoined in Connecticut not as to publishing his book, but as to tailoring instruments and rendering personal advice relating to the particular needs of particular customers.

Similarly, in light of First Amendment considerations, courts have refused to enjoin non-lawyers from publishing "divorce kits" containing forms and impersonal legal advice. *In re William Thompson*, 574 S.W.2d 365 (Mo. 1978); *Florida Bar* v. *Brumbaugh*, 355 So.2d 1186 (Fla. 1978), *overruling Florida Bar* v. *Stupica*, 300 So.2d 683 (Fla. 1974); *Oregon State Bar* v. *Gilchrest*, 272 Or. 552, 538 P.2d 913 (1975); *see also State Bar of Michigan* v. *Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976); *but see Palmer* v. *Unauthorized Practice Committee*, 438 S.W.2d 374 (Tex. Civ. App. 1969).

Lawyers, doctors and personal investment advisers who give personal advice to individual clients may be licensed as professionals and their licenses may be revoked for misconduct. But publishers, such as petitioners, who only publish information and opinion, may not be deprived of their First Amendment rights through a system of discretionary licensing.

C. Petitioners' Publications Are Not "Commercial Speech."

Petitioners' publications are not commercial speech. Commercial speech requires that the speaker have an economic interest in the transaction he proposes. Petitioners have no such interest in the sale or purchase of the securities that their newsletters discuss.

The Court has described "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas* v. *Public Service Commission*, 447 U.S. 557, 561 (1980) (citing *Virginia Pharmacy Board* v. *Virginia Citizens Consumer*

Council, 425 U.S. 748, 762 (1976), *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 363-64 (1977), and *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979)).

The Court has also said that:

> our decisions have recognized "the 'common sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978); see *Bates* v. *State Bar of Arizona, supra*, at 381; see also Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 38-39 (1979).

Central Hudson Gas, 447 U.S. at 562 (footnote omitted).

More recently, in *Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2880 (1983), the Court referred to "the core notion of commercial speech—'speech which does "no more than propose a commercial transaction,"'" (citing *Virginia Pharmacy Board*, 425 U.S. at 762, quoting *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). In *Bolger* the Court held that commercial speech included a manufacturer's promotional material in the form of informational pamphlets. The Court relied on the combination of the following factors: the pamphlets were conceded to be advertisements, they referred to a specific product, and the manufacturer had an economic motivation in disseminating them. 103 S. Ct. at 2880.

Justice O'Connor subsequently described "commercial speech" as "speech intended and used to promote a commercial transaction with the speaker." *Roberts* v. *United States Jaycees*, 104 S. Ct. 3244, 3258 (1984) (O'Connor, J., concurring).

The speech that fits the Court's definitions is commercial advertising, a term which as used here includes related promotional material. Commercial advertising is characterized by the speaker's economic interest in the commercial transaction that his speech promotes. Commercial advertising, in which the speaker has such an economic interest, is the type of speech that relates solely to the economic interests of the speaker and his audience and that proposes a commercial transaction. It is also the type of speech intended and used to promote a commercial transaction with the speaker.

Cases in which the Court has identified commercial speech have dealt exclusively with commercial advertising and in each case the speaker had an economic interest in the commercial transaction that his speech promoted. *See, e.g., Virginia Pharmacy Board, supra* (advertising by pharmacists); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) (advertising by seller of residential property); *Bates, supra* (advertising by lawyers; *Ohralik* v. *Ohio State Bar Association, supra* (advertising by lawyers); *Friedman, supra* (use of trade names by optometrists); *Central Hudson Gas, supra* (promotional advertising by utility company); *Matter of R-M-J*, 455 U.S. 191 (1982) (advertising by lawyers); and *Bolger, supra* (promotional advertising by manufacturer of prophylactics).

The court of appeals misconstrued *Bates* and *Friedman*, in deciding that "[the Court's] definitions do not limit

commercial speech to advertising," 725 F.2d at 900.* *Bates* indicated, as the court of appeals said, that commercial speech "'must be distinguished by its content,'" 433 U.S. at 363 (quoting *Virginia Pharmacy Board*, 425 U.S. at 761). But the "content" in *Bates* was commercial advertising by lawyers and in *Virginia Pharmacy Board* it was advertising by pharmacists. In *Friedman*, the Court said, as the court of appeals indicated, that "by definition, commercial speech is linked inextricably with commercial activity." 440 U.S. at 10 n. 9. But the definition of commercial speech actually used in *Friedman*, as elsewhere, is "speech that does no more than propose a commercial transaction." *Id.* (quoting *Pittsburgh Press Co.*, 413 U.S. at 385). Neither *Bates* nor *Friedman* suggested any expansion of commercial speech beyond commercial advertising to include a newsletter whose publisher has no economic interest in the transaction about which he writes.

The Court has noted two features of commercial speech that permit its regulation. The commercial speaker has extensive knowledge of his product and as a consequence of his economic self-interest in the proposed transaction, his speech is a hardy form of expression. *Central Hudson Gas*, 447 U.S. at 564 n. 6; *Bates*, 433 U.S. at 381; *Virginia Pharmacy Board*, 425 U.S. at 771-72 n. 24. Both features

* The Second Circuit's view conflicts with that of the Third and Fourth Circuits and, apparently, the Fifth Circuit. *See Ad World, Inc.* v. *Doylestown*, 672 F.2d 1136, 1140 (3rd Cir.), *cert. denied*, 456 U.S. 575 (1982) ("[t]he Supreme Court has confined the category of 'commercial speech' to cases involving 'purely commercial advertising'"), *Davenport* v. *City of Alexandria*, 710 F.2d 148, 150 n. 6 (4th Cir. 1983) (*en banc*) ("'commercial speech' is a legal term of art referring to advertising . . . .") and *Turner Advertising Co.* v. *National Service Corp.*, No. 83-3588, —— F.2d —— (5th Cir., slip opinion, September 27, 1984).

indicate that commercial speech is limited to commercial advertising by speakers economically interested in the transaction being proposed.

In *Central Hudson Gas*, the Court said:

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

447 U.S. at 564 n. 6.*

By contrast, commentators in the press, evaluating a product offered by others, do not have the same knowledge

* In *Virginia Pharmacy Board*, the Court said,

> The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

425 U.S. at 771-72 n. 24.

In *Bates*, the Court said,

> Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *id.* [*Virginia Pharmacy Board*, 425 U.S.], at 771-772 n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.*

433 U.S. at 381.

as the manufacturer or seller of the product and certainly do not have his degree of economic self-interest in talking about the product.

Commercial speech has also been explained in terms of the state's legitimate interest in regulating the terms of sale of commercial products and services. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372, 386-89 (1979). The "informational function" of the sellers' speech is protected by the First Amendment. *See Central Hudson Gas*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising"). But the seller's statements about his products or services also have a "contractual function" in that they form part of the transaction between the seller and the buyer. To be able to regulate that transaction, for example to prevent fraud, deception or overreaching by the seller, the state must be able to regulate what the seller says. It is therefore the "contractual function" of the seller's speech that allows regulation. As noted by Farber:

> Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informative function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language. So long as a regulation relates to the contractual function of the utterance, the regulation should not be subject to the intensive scrutiny required when a regulation

> directly implicates the first amendment function of language.

Id. at 387 (footnote omitted). The government interest disappears however when the utterance is made by a third person with no relation to the transaction. *Id.* at 388-89.

Disinterested speech *about* commercial products by the press is not commercial speech. As stated by Jackson and Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 at 1 (1979):

> 'Commercial speech' refers to business advertising that does no more than solicit a commercial transaction or state information relevant thereto. Both content and context are critical to this classification. Editorial advertising is not commercial speech, and neither is a discussion of goods or services in a news account or consumer guide.

(footnote omitted).*

Because petitioners have no economic interest in the commercial transactions they discuss, petitioners' publications are not "commercial speech." Petitioners' disinterested comments about the advisability of buying, *e.g.*, IBM

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* To the same effect is Note, *Constitutional Protection of Commercial Speech*, 82 Colum. L. Rev. 720 at 720 (1982):

> The initial problem presented in dealing with commercial speech is that of definition. Two ingredients must at a minimum be present. The first is one of content: the speech must tend to promote the purchasing of goods or services. The second is one of motivation; the purpose of the speech must be the advancement of the financial interests of the speaker via that transaction.
>
> Economic motivation alone can never be sufficient to classify speech as commercial. . . . Similarly, commercial content alone is insufficient—Consumer Reports is not in the same category for First Amendment purposes, as product advertising. Hence it is the combination of the two elements that is the key.

stock or Chrysler stock are no different from *Consumer Reports'* comments about the advisability of buying IBM computers or *Motor Trend*'s comments about the advisability of buying Chrysler cars. Like others who only write about, but have no interest in, commercial products, petitioners publish opinions that are not "expression related solely to the economic interests of the speaker and its audience." Petitioners do not sell investments; they report and comment on the investments offered by others. Their expression relates to the economic interests not of themselves, but of their readers and third persons in the market with whom their readers may buy and sell securities, and of the public in general. Petitioners are not economically affected by whether their subscribers buy or sell particular investments or do nothing.

Similarly, petitioners' publications are not "speech proposing a commercial transaction." Petitioners do not propose commercial transactions; they comment on the advisability of transactions proposed by others.

Petitioners' speech does not have the distinguishing features of commercial speech that permit regulation. Since petitioners only comment on investments offered and sold by others, they are "outsiders," and lack the "extensive knowledge" possessed by the issuers and sellers of these investments.

Petitioners' form of expression also lacks the "hardiness" of commercial advertising. Petitioners are writers selling only their own writings and do not have the "economic self-interest" of the issuers, underwriters or shareholders promoting the sale of securities owned or held by such persons.

Finally, since petitioners are not selling securities, their speech has no "contractual function." Their speech has only an "informational function," and is therefore pure First Amendment speech.

D. Even if Petitioners' Publications Contain Commercial Speech, a Permanent Injunction Is Excessive.

The Court has set forth a four-part analysis for commercial speech cases:

> For commercial speech to come within that provision [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas, 447 U.S. at 566; *Accord, Bolger*, 103 S. Ct. at 2881.

Under a commercial speech analysis, the remedy of outright prohibition of all future speech is almost always more extensive than necessary to serve the Government's interest. *See, e.g., Virginia Pharmacy Board, Linmark Associates, Bates, Ohralik, Central Hudson Gas, R-M-J* and *Bolger, supra.* In *Central Hudson Gas*, the Court stated: "Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n. 9. Even when an advertiser has previously published

deceptive advertising, a total ban on future advertising would be unconstitutional where corrective disclosures can be provided. *See, e.g., National Commission on Egg Nutrition* v. *FTC,* 570 F.2d 157 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978) (FTC may not constitutionally prohibit a trade association's dissemination of statements as to the absence of risk of heart attack from eating eggs; additional disclosure required).

In *Bolger,* the Court held that the statute that prohibited the mailing of unsolicited advertisements for contraceptives was invalid, because it was more extensive than the government's asserted interest in protecting minors permitted and because "it denies to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area." 103 S. Ct. at 2884 (footnote omitted). Similarly, even under a commercial speech analysis, a *total ban* on Lowe's future publishing of investment information would deny the public *truthful information* bearing on its ability to discuss and make informed decisions in connection with lawful economic matters and is more extensive than necessary to protect any relevant government interest. Given the disclosure mechanisms and post-publication civil and criminal penalties available to remedy wrongdoing, the censorship that the Commission would impose on petitioners is more extensive than necessary to effectuate any proper government objective.

III.

The Act Unconstitutionally Discriminates Against Newsletter Publishers.

The Act unconstitutionally discriminates against petitioners and other investment newsletter publishers in favor of the publishers of newspapers, news magazines and business and financial publications of general and regular circulation.

Section 202(a)(11)(D) of the Act, 15 U.S.C. § 80b-2(a)(11)(D), excludes from the definition of investment adviser, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." The court of appeals, saying it was applying the test of *SEC* v. *Wall Street Transcript,* 422 F.2d 1371 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970), held that this exclusion was not available to appellants because they were not engaged primarily in "customary newspaper activities" but rather were engaged in the activities that the Act is intended to regulate.* 725 F.2d at 898.

The exclusion has also been explained by the Commission in a release that states, "[t]his exception is applicable only where, based on the content, advertising material, readership, and other relevant factors, a publication is not primarily a vehicle for distributing investment advice."

* *Wall Street Transcript* had held that the applicability of the exemption does not depend on objective factors but that "[w]hat matters is whether or not a specific publication is engaged in practices which the Act was intended to regulate, such as the offering of professional investment advice without revealing the possibility of personal gain to the publisher from what he reports or how he presents it." *Id.* at 1378. The *Wall Street Transcript* test appears to be circular, in that the activities the Act was intended to regulate depends on whom the Act was intended to cover.

Applicability of Investment Advisors Act to Certain Publications, SEC Rel. No. IA-563, 42 Fed. Reg. 2953 n. 1 (1977) (codified at 17 C.F.R. § 276).* The Commission's test was recently applied in *SEC* v. *Suter,* 732 F.2d 1294 (7th Cir. 1984).

Whether under the *Wall Street Transcript* test or the Commission's test, if a newsletter publisher publishes analyses of stocks, he is required to register. But if the *Wall Street Journal* or *Barron's* publishes the identical analyses, their publisher is not required to register. Similarly, under the court of appeals holding, Christopher Lowe may not publish investment opinion in his own newsletters, but he is free to publish the same opinion if he is employed by a general circulation newspaper.** 725 F.2d at 902. If he works for a newspaper, he can freely write, e.g., "IBM is a good stock." But if he publishes that statement in his newsletters, he can be imprisoned.

The Act's discrimination against newsletters violates the elementary rule that the freedom of the press applies to all publishers.

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Branzburg v. *Hayes,* 408 U.S. 665, 704 (1972) (quoting *Lovell* v. *Griffin,* 303 U.S. 444, 450 (1938)). The traditional doctrine is that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph *just as much* as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg,* 408 U.S. at 704 (emphasis added).

The First Amendment does not permit the favoring of one segment of the press over another. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .'" *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 790-91 (quoting *Buckley* v. *Valeo,* 424 U.S. 1 at 48-49 (1976)). As noted by Chief Justice Burger:

> The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell* v. *Griffin, supra,* 303 U.S. at 451-452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fevor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinion supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary

* In addition to including investment newsletters, the Commission's release includes within the definition of "investment adviser" publishers of books on investments where the books appear either in a series or are intended to be supplemented or updated. *See* SEC Rel. No. 1A-563, *supra.* On the other hand, the statutory definition also appears to exclude persons who for compensation disseminate investment opinion through non-print media.

** The Commission's staff takes the position that a person who writes an investment column for an exempt publication as an independent contractor, and not as an employee, is not exempt. *See Bernard Feuer,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,954 (1978).

> view: [quoting from *Branzburg*, at 408 U.S. at 704-05] . . . .

435 U.S. at 801 (Burger, C.J., concurring) (footnote omitted). *See also Smith* v. *Daily Mail Publishers Co.*, 443 U.S. 97 (1979) (holding unconstitutional a statute restricting newspapers from printing the names of those charged in juvenile proceedings but not restricting the electronic media or any other form of publication).

The Court recently invalidated under the First Amendment the Minnesota ink and paper use tax, not only because the tax singled out the press, but also because it targeted a small group of newspapers. *Minnesota Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 103 S. Ct. 1365, 1375-76 (1983). "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action[,]" *id.* at 1376, a burden that Minnesota failed to satisfy.

The distinction between regulated and excluded publications also violates the First Amendment ban on discrimination based on a publication's content. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan* v. *Time, Inc.*, 104 S. Ct. 3262, 3267 (1984) (citing *Carey* v. *Brown*, 447 U.S. 455, 463 (1980) and *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972)).

The distinction between regulated publications and excluded publications appears to turn partly on the content of the messages in the publication. If the publication includes sufficient non-investor-oriented material, it may become exempt. Review of content is therefore necessary. SEC Release No. IA-563, *supra*, expressly acknowledges the need to review content, among other factors, to determine whether the exclusion applies. Courts have also found it necessary to examine content, among other factors, to determine the applicability of the exclusion. Compare *SEC* v. *Suter*, *supra* (Suter's newsletters are not excluded) and *SEC* v. *Wall Street Publishing Institute*, [Current Volume] Fed. Sec. L. Rep. (CCH) ¶ 91,575 (D.D.C. July 12, 1984), *motion for stay pending appeal granted*, *id.*, ¶ 91,635 (D.C. Cir. August 10, 1984) (*Stock Market Magazine* is not excluded) with *SEC* v. *Wall Street Transcript*, 454 F. Supp. 559 (S.D.N.Y. 1978) (*Wall Street Transcript* is excluded).*

Under the court of appeals holding, a content-based examination of petitioners' future publications is necessary to determine whether any such publication will be regulated. Judge Brieant, dissenting below, asked:

> Suppose following remand, Lowe should transfer stock ownership of his corporations to a friend and add to his newsletters a tidetable, a list of ship arrivals, Ann Landers, a crossword puzzle and selections reprinted from *Areopagitica*? Would his newsletters now be *bona fide* newspapers, in the eyes of the majority?

725 F.2d at 908. To answer this question necessitates a detailed review and an evaluation of the publication's content, in violation of the constitutional ban on content-based discrimination.

---

* The Commission's staff reviews content to determine the applicability of the exclusion in response to requests for "no-action" letters. *See, e.g., Media General Financial Daily*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,961 (1971) (*Media General Financial Daily* is not excluded) and *Finance Magazine*, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,536 (1971) (*Finance Magazine* is excluded).

The Act's discriminatory treatment of newsletters also violates the principles of equal protection incorporated in the due process clause of the Fifth Amendment. Under those principles, a statutory classification that significantly interferes with the exercise of a fundamental right cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *Zablocki* v. *Redhail*, 434 U.S. 374, 388 (1978). "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justification offered for any distinctions it draws must be carefully scrutinized." *Carey* v. *Brown*, 447 U.S. at 461-62 (citations omitted).

The Commission cannot under the First Amendment justify the Act's discrimination against newsletters nor under the Fifth Amendment can it show that such discrimination is closely tailored to effectuate a sufficiently important government interest. The danger of potential securities fraud is not a sufficient interest to justify any discretionary licensing of the press. *See* Point I, *supra*. But even if, *arguendo*, it were sufficient, that danger exists as much in the case of an exempt national newspaper or news magazine which chooses to publish investment information, as it is for a small newsletter publishing the same information. Newspapers and news magazines are not inherently immunized against the practice of securities fraud.* And by virtue of

* *See Senate Report on the Securities Exchange Act of 1934*, S. Rep. No. 792, 73d Cong., 2d Sess. 8 (1934): "In one instance a financial writer on a great New York newspaper was discovered to have been a regular participant in the profits of a free-lance trader, without obligation except to publicize the stocks of the trader," quoted by Judge Weinstein at 556 F. Supp. at 1363. *See also Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979), where a financial writer employed by the Los Angeles Herald-Examiner violated the Commission's Rule 10b-5 by failing to disclose material facts in his newspaper column.

the enormous circulation of some exempt newspapers and news magazines, these publications and their employees have the capability of inflicting far greater damage on the investing public than any 5000-subscriber newsletter ever could.

The legislative history of the 1940 Act contains little justification for the distinction between newsletter publishers and exempt publishers. Congress was concerned with "unscrupulous tipsters and touts," H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940), but it did not examine the extent to which newspapers and others were also engaged in the same types of practices it was seeking to control. The only relevant discussion in the legislative history of the Act is a clear warning, which the draftsman evidently chose to disregard, in a memorandum prepared by the Research Division of the Illinois Legislative Counsel, that under *Lovell* v. *Griffin*, *supra*, all publications were protected by the First Amendment and Congress could not require licensing of a portion of the press. *Hearings on Investment Trusts and Investment Companies*, S. 3580, *Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. 1004, 1008-09 (1940).

In light of the equality of treatment constitutionally mandated for all parts of the press and in the absence of any clear and compelling justification for singling out newsletter publishers, the Act's discriminatory treatment of newsletters violates both the First and Fifth Amendment rights of petitioners.

Conclusion

The Court Should Invalidate Section 203(e) of the Act as it Applies to Publishers and Should Reverse the Judgment Below.

The Court should invalidate section 203(e) of the Act as it applies to publishers because the section imposes an unconstitutional prior restraint. The Court should not attempt to rewrite the Act, as Judge Weinstein did, to eliminate the Commission's licensing discretion over impersonal investment advisers. As pointed out by the court of appeals, 725 F.2d at 896, the legislative history provides no basis for such distinguishing between impersonal and personal advisers. Moreover, where a licensing law has been found to license unconstitutionally the rights of free speech or free press, the Court in the past has had no hesitancy in striking down the law.

Alternatively, the Court should invalidate section 203(e) as it applies to regulated publishers because it unconstitutionally discriminates against them and favors other segments of the press. This discrimination may not be eliminated merely by voiding the exclusion, since nothing in the legislative history suggests that Congress intended to subject the publications described in the exclusion to any type of registration.

Whatever determination is made with respect to section 203(e) as applied to publishers, the judgment of the court

of appeals imposes an unconstitutional prior restraint on petitioners' right to publish and should be reversed.

Dated: November 14, 1984

Respectfully submitted,

MICHAEL E. SCHOEMAN
SCHOEMAN, MARSH, UPDIKE & WELT
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Counsel for Petitioners

Of Counsel:
MICHAEL P. RICHMAN

No. 83-1911

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
Securities and Exchange Commission
Washington, D.C. 20549
(202) 272-3171

Counsel for Respondent

MICHAEL E. SCHORMAN
SCHORMAN, MARSH, UPDIKE & WELT
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Counsel for Petitioners

Petition for Certiorari Filed May 16, 1984
Certiorari Granted October 1, 1984

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7. Trial Exhibit No. 1: Opinion and Order of the Securities and Exchange Commission JA64

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Note: The opinions rendered in the courts below are printed in the appendix to the petition for certiorari.

Relevant Docket Entries

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DATE	PROCEEDINGS
6/ 8/82	Complaint filed. Summons issued. em(1)
6/ 8/82	Application for an OTSC, a TRO, an order freezing certain assets & records of the defs, & an order for expedited discovery, filed. em(2)
6/10/82	BEFORE WEINSTEIN, J.—Case called. Counsel for both sides present. Pltffs Order to Show Cause for TRO freezing certain assets—Argued—Denied. Pltffs order for expedited discovery GRANTED. Order to show cause signed, ret 9/13/82 @10:00 for preliminary injunction. Mag order previously signed referring case to Mag. Caden. eo—
6/11/82	BY WEINSTEIN, J.—Order dtd 6/10/82 @2:55p.m. to Show Cause ret 9/13/82 @10:00a.m. why this court should not enter a preliminary injunction enjoining the defts from making use of the mails or the means or instrumentalities of interstate commerce, etc. Filed. See order for details. eo(6)
6/11/82	Memorandum in Support of Pltffs application for a temporary Restraining order and motion for preliminary injunction, an order freezing certain assets and records of the Defts and an order expediting discovery. Filed. eo(7)
7/15/82	ANSWER of defts filed. ad(20)

DATE	PROCEEDINGS
9/13/82	Before WEINSTEIN, CH.J.—Case called. Counsel for both sides present. Non-jury trial ordered & begun. Pltff's opening. Deft's opening. Briefs to be submitted. Oral argument to be held after briefs submitted. Parties to submit findings of fact & law. Date to be set. Trial concluded. mw—
11/10/82	Before WEINSTEIN, J.—Case called; All sides present. Final argument heard on preliminary injunction & trial on the merits—specifics on record. Decision reserved. gb—
2/ 1/83	By WEINSTEIN, CH.J.—MEMORANDUM & ORDER dtd 2/1/83 that the petition for a temporary & permanent injunction pursuant to sec. 209(e) of the Advisers Act, 15 U.S.C. 80b-9(e)(1976), & the petition for an equitable order of disgorgement of monies received in the course of the business of impersonal investment advisory publication are DENIED. An injunction will issue denying defts permission to give securities information to their subscribers or potential subscribers directly or indirectly by telephone, individual letter or in person (see Order details) filed. mw(55)
2/ 3/83	CLERK'S JUDGEMENT dtd 2/2/83—Ordering that an injunction issue denying defts permission to give securities information to their subscriber or potential subscribers directly or indirectly by telephone, individual ltr or in person & that judgment is hereby entered denying petition for a temporary & permanent injunction pursuant to sec. 209(e) of the Advisers Act, 15 USC 80b-9(e) (1976) & that judgment is entered denying the

DATE	PROCEEDINGS
	petition for an equitable order of disgorgement of monies received in the course of the business of impersonal investment advisory publication & that judgment is entered enjoining defts fm giving information to their subscribers or potential subscribers directly or indirectly by telephone, individual ltr, or in person, filed. mw(56) APPROVED: JACK B. WEINSTEIN, CHIEF JUDGE.
3/ 1/83	BEFORE WEINSTEIN, J.—Case called. All sides present. Deft's Motion for an order altering or amending the judgment so as to delete therefm the final paragraph & to substitute it Argued—Denied for the reasons orally stated on the record. eo—
4/28/83	NOTICE OF APPEAL (pltff-appellant) from judgment entered 2/3/83, filed. No fees involved. C of A notified. Affidavit of service attached vw(61)
5/ 6/83	NOTICE OF CROSS-APPEAL (defts-appellants) from judgment entered 2/3/83 & oral order entered 3/1/83, filed with receipt #48513 for C of A docketing fee. C of A notified. Affidavit of service annexed. vw(63)
6/ 2/83	Clerk's certificate certified and documents delivered to C of A. Ack. requested. (copies of docket, clerk's cert. and index sent to C of A. filed. gb

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Argument Date: 09/19/83

Decision Date: 01/18/83

Petition for Rehearing Filed: 02/01/84

Petition for Rehearing Decision: DN

Decision Date: 02/21/84

Mandate Issued: 03/06/84

Cert. Filed: 05/16/84

Cert. Decision: G

Decision Date: 10/03/84

Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Filed
In Clerk's Office
U.S. District Court E.D.N.Y.
Jun 8 1982

CV 82-1616, Weinstein, J.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

CHRISTOPHER L. LOWE a/k/a CHRIS L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION, LOWE STOCK CHART SERVICE, INC.,

Defendants.

Plaintiff Securities and Exchange Commission ("Commission") for its Complaint herein alleges that:

1. Defendants Christopher L. Lowe a/k/a Chris L. Lowe ("Lowe"), Lowe Publishing Corporation ("Lowe Publishing"), Lowe Management Corporation ("LMC") and Lowe Stock Chart Service, Inc. ("Lowe Service") have

engaged, are engaged and, unless enjoined, will continue to engage, in acts, practices and courses of business which constitute and will constitute violations of Sections 203(a), 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§80b-3(a), 80b-6(1) and 80b-6(2).

2. Defendant Lowe has engaged, is engaged and, unless enjoined will continue to engage, in acts and practices which constitute violations of that portion of an order issued by the Commission on May 11, 1981 pursuant to Section 203(f) of the Advisers Act, 15 U.S.C. §80b-3(f).

Jurisdiction and Venue

3. The Commission brings this action pursuant to Section 209(e) of the Advisers Act, 15 U.S.C. §80b-9(e), to enjoin the defendants from engaging in such acts, practices and courses of business as are more fully described herein and for certain equitable relief.

4. This Court has jurisdiction over this action pursuant to Section 214 of the Advisers Act, 15 U.S.C. §80b-14.

5. The Defendants, directly and indirectly, have made use of the mails and the means or instrumentalities of interstate commerce in connection with the acts, practices and courses of business alleged herein, and certain of the acts, practices and courses of business alleged herein, constituting violations of the Advisers Act, have occurred and are now occurring in the Eastern District of New York.

The Defendants

6. *Christopher L. Lowe a/k/a Chris L. Lowe* is 30 years old and resides in Westfield, New Jersey. Lowe is the president of Lowe Publishing, LMC and Lowe Service. He is also the research chairman and editor of the *LIFL*, the *Lowe Stock Advisory* and the *Lowe Stock Chart Service*. On May 11, 1981, Lowe was barred from association with any investment adviser by order of the Commission. In 1982, he was convicted of larceny in New Jersey and sentenced to three years imprisonment. He currently is released on bail pending appeal.

7. *Lowe Publishing Corporation* is a Delaware corporation which maintains a post office address in Westfield, New Jersey. Lowe Publishing appears to be the publisher of the *Lowe Investment & Financial Letter* ("*LIFL*") and the *Lowe Stock Advisory*.

8. *Lowe Management Corporation*, a Delaware corporation, maintains the same post office address as Lowe Publishing. LMC also appears to publish the *LIFL* and the *Lowe Stock Advisory*. Between 1974 and 1981, LMC was an investment adviser registered with the Commission as such, and publisher of both the *LIFL* and the *Lowe Stock Advisory*. LMC's registration as an investment adviser was revoked by order of the Commission on May 11, 1981.

9. *Lowe Stock Chart Service, Inc.* maintains the same post office address as Lowe Publishing and LMC. Lowe Service is the publisher of the *Lowe Stock Chart Service*.

Facts

10. Plaintiff Commission realleges and incorporates by reference each and every allegation made in paragraphs 1 through 9.

LMC's Registration as an Investment Adviser

11. On March 29, 1974, LMC registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act, 15 U.S.C. §80b-3(c).

12. From March 29, 1974 up to at least May 11, 1981, Lowe was the president, treasurer and majority stockholder of LMC.

13. During the period from March 29, 1974 up to May 11, 1981, LMC, as an investment adviser, managed the funds of advisory clients and published two investment advisory newsletters: the *LIFL* and the *Lowe Stock Advisory*.

14. Between 1974 and 1981, LMC maintained its principal business office at 26 Broadway, New York, New York and, since 1981, has maintained a business office in Westfield, New Jersey.

Lowe's New York State Criminal Convictions

15. On July 19, 1977, the grand jury of the County of New York returned a twenty-four count indictment against Lowe, charging, *inter alia*, violations of Sections 352-c and 359-eee of Article 23-A of the General Business Law of the State of New York (the anti-fraud and registration provisions).

16. On November 4, 1977, in the Supreme Court of the State of New York, Lowe pled guilty to two counts of said indictment, both misdemeanors.

17. Specifically, Lowe was convicted by his plea of guilty to:

(a) Count Twenty-Two of said indictment for representing to one of Lowe's advisory clients that Lowe had managed and invested funds of that client so that a 27% profit was earned through the purchase and sale of securities when, in fact, Lowe made no such purchase or sale but appropriated the funds of the client, in the amount of $2,200, to Lowe's own use [N.Y. Gen. Bus. Law §352-c]; and

(b) Count Twenty-Four of said indictment for failing to file as an investment advisor with the Department of Law of the State of New York, in that Lowe, for compensation, engaged in the business of advising members of the public, either directly or through publications or writings within or from the State of New York, as to the value of securities or as to the advisability of investing in, purchasing or selling or holding securities; and as part of a regular business, issued or promulgated, analysis or reports concerning securities to members of the public within or from the State of New York, without having filed as an investment adviser, as required by Section 359-eee of Article 23-A of the General Business Law of the State of New York.

18. On April 5, 1978, Lowe was sentenced to a three-year period of probation for his violation of Section 352-c of the General Business Law and an unconditional discharge for his violation of Section 359-eee of the General Business Law (Counts Twenty-two and Twenty-four of the July 19, 1977 indictment, respectively).

19. On October 20, 1978, a two count information and a twenty-two count information were filed against Lowe by the District Attorney for the County of New York.

20. On December 1, 1978, Lowe was convicted by his plea of guilty to Count Two of the two count information (Tampering with Physical Evidence); Lowe with the intent that false physical evidence be used and introduced in a pending criminal proceeding against him, produced and offered at said proceeding such evidence, knowing it to be false, in the form of a forged copy of a Western Union money order which had been altered from ten dollars to $10,000 [N.Y. Penal Law §215.40].

21. Also, on December 1, 1978, Lowe was convicted by his plea of guilty to Count Four of the twenty-two count information (Grand Larceny in the Third Degree), which charged that Lowe stole certain property owned by Manufacturers Hanover Trust Company having an aggregate value of $684.00, to wit, United States Currency. [N.Y. Penal Law §155.30].

22. On March 27, 1979, as a result of his pleas to the two informations, Lowe was sentenced to a prison term of 60 days, followed by probation of four years and ten months and ordered to make restitution in the amount of $8,227.42 at 6½% interest payable over the term of his probation.

Commission Proceedings Against Lowe and LMC

23. On October 10, 1979, the Commission instituted public administrative proceedings, pursuant to Sections 203(e) and (f) of the Advisers Act, 15 U.S.C. §§80b-3(e)

and 80b-3(f), naming LMC and Lowe as respondents and alleging that:

(a) on April 5, 1978, Lowe was convicted in the Supreme Court of the State of New York on his plea of guilty to two misdemeanors arising out of his conduct as an investment adviser to wit: Sections 352-c and 359-eee of Article 23-a of the General Business Law of the State of New York and was sentenced to three years probation;

(b) on March 27, 1979, Lowe was convicted in the Supreme Court of the State of New York on his plea of guilty to the felonies of Grand Larceny in the Third Degree and Tampering With Physical Evidence and was sentenced to a prison term of sixty days to be followed by probation of four years and ten months;

(c) since the date of Lowe's convictions on April 5, 1978 and March 27, 1979, respondent Lowe willfully aided and abetted willful violations by respondent LMC of Sections 204 and 207 of the Advisers Act and Rule 204-1(b) thereunder [15 U.S.C. §§80b-4 and 80b-7] [17 C.F.R. §275.204-1(b)], by failing to amend the negative answer to Question 16(b) of LMC's Form ADV (investment adviser registration form) [to disclose Lowe's criminal convictions];

(d) during the period from approximately June 1976 through approximately April 1978, respondent Lowe willfully aided and abetted willful violations by respondent LMC of Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §§80b-6(1) and 80b-6(2)] in that LMC, aided and abetted by Lowe, by use of the mails and means of instrumentalities of interstate commerce, employed a device, scheme, or artifice to defraud LMC's clients and engaged

in transactions, practices or courses of business which operated as a fraud or deceit upon its clients concerning, among other things:

(i) the withholding of funds of advisory clients' and

(ii) the making of untrue and misleading statements concerning the return of advisory clients' funds.

24. On April 14, 1980, following a full evidentary hearing, an Administrative Law Judge rendered an initial decision *In the Matter of Lowe Management Corporation and Chris L. Lowe,* Admin. Proc. File No. 3-5823 (April 14, 1980), finding that Lowe willfully aided and abetted LMC's willful violations of Sections 204, 206(1), 206(2) and 207 of the Advisers Act, 15 U.S.C. §80b-4, 80b-6(1), 80b-6(2) and 80b-7, and Rule 204-1(b) thereunder, 17 C.F.R. §275.204-1(b), and ordering that LMC's investment adviser registration be revoked and that Lowe be barred from being associated with any investment adviser. LMC and Lowe filed a petition for review of this decision with the Commission.

25. On May 11, 1981, the Commission issued an opinion in *In the Matter of Lowe Management Corporation and Chris L. Lowe,* Admin. Proc. File No. 3-5823, finding that Lowe willfully aided and abetted LMC's willful violations of: (1) Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. §§80b-6(1) and 80b-6(2), in that Lowe and LMC breached their fiduciary duty to an advisory client in improperly withholding the client's funds and making misstatements concerning their return; and (2) Section 204 of the Advisers Act, 15 U.S.C. §80b-4, and Rule 204-1(b),

17 C.F.R. §275.204-1(b), thereunder, in that LMC failed to promptly amend its Form ADV (investment adviser registration form) to disclose Lowe's state criminal convictions. Investment Advisers Act Rel. No. 759 (May 11, 1981).

26. On May 11, 1981, the Commission also issued an order imposing remedial sanctions, revoking the registration of LMC as an investment adviser and barring Lowe from association with any investment adviser ("the 1981 Order"). Investment Advisers Act Rel. No. 759 (May 11, 1981).

Investment Advisory Activities Following the Commission's 1981 Order

27. On September 8, 1981, Commission staff received from a *LIFL* subscriber in Minneapolis, Minnesota, a copy of a *LIFL* "Complimentary Interim Bulletin," dated August 21, 1981, and issued three months after the 1981 Order. This *LIFL* contained general stock market information and made specific recommendations concerning money market funds.

28. The August 21, 1981 issue of *LIFL* was published by Lowe Publishing and signed by Lowe as *LIFL* research chairman and editor.

29. Also, on September 8, 1981, Commission staff received from the Minneapolis subscriber a copy of a letter from the Lowe Publishing Group advertising the *LIFL,* the *Lowe Stock Advisory* and the *Lowe Stock Chart Service,* which stated that Lowe Publishing Group is "trying to give quality advice in several investment areas (market

timing, stock selection, trading, low-priced issues, . . . mutual funds and stock charts)." The Lowe Publishing Group letter was signed by Lowe as president.

30. Also, on September 8, 1981, Commission staff received from the Minneapolis subscriber a letter addressed to *LIFL* subscribers on the letterhead of the *Lowe Stock Advisory,* offering a complimentary six-issue subscription to the *Lowe Stock Advisory,* a publication described as making recommendations of "low-priced action-packed issues."

31. A member of the Commission's staff, who resides in the Eastern District of New York and who was not a *LIFL* subscriber, completed and mailed a copy of the complimentary subscription form to the *Lowe Stock Advisory.* On or about November 23, 1981, the staff member received by mail a *Lowe Stock Advisory* "Complimentary Interim Bulletin" dated November 16, 1981. The issue contained general stock market information and specific stock recommendations and was published by LMC.

32. On or about February 23, 1982, Commission staff received from the Minneapolis *LIFL* subscriber copies of two pages of an eight-page issue of *LIFL,* dated December 11, 1981. The issue contained general stock market information and specific investment advice.

33. The December 11, 1981 *LIFL* issue was published by Lowe Publishing and listed Lowe as research chairman and editor.

34. On or about February 23, 1982, Commission staff also received from the Minneapolis subscriber a copy of

an offer and subscription form sent to *LIFL* subscribers, to renew or extend *LIFL* paid subscriptions for one, two or three years at a cost of $39, $59 and $79, respectively. The offer promised *LIFL* issues containing "specific stock recommendations" and directed that checks be made payable to Lowe Publishing.

35. The *LIFL* subscription renewal offer was signed by Lowe as research chairman and editor of the *LIFL,* the *Lowe Stock Advisory* and the *Lowe Stock Chart Service.*

36. On or about February 23, 1982, Commission staff also received from the Minneapolis subscriber a copy of an offer and subscription form, sent to *LIFL* subscribers, for an introductory five-week paid subscription to the *Lowe Stock Chart Service,* a weekly and monthly publication wherein defendant Lowe, through his corporate alter ego, Lowe Service, claims to chart the price, volume, sales and earnings of listed and unlisted stocks. The offer directed that subscription checks for the *Lowe Stock Chart Service* be made payable to Lowe Service and mailed to the Lowe Publications Subscription Service Center in Westfield, New Jersey.

37. On or about March 1, 1982, two Commission staff members, who reside in the Eastern District of New York, mailed completed copies of subscription forms, together with personal checks and cover letters, to the Lowe Publications Subscription Service Center in Westfield, New Jersey.

38. One Commission staff member mailed a check in the amount of $39.00 made payable to Lowe Publishing for a one-year subscription to the *LIFL.*

39. The other Commission staff member mailed a check in the amount of $33.00 made payable to Lowe Service for a five-week trial subscription to the *Lowe Stock Chart Service*.

40. On or about March 15, 1982, the *LIFL* subscription check, described in paragraph 38 of this Complaint, was deposited into the account of Lowe Publishing at the First Jersey National Bank, Newark, New Jersey.

41. On or about March 15, 1982, the *Lowe Stock Chart Service* subscription check, described in paragraph 39 of this Complaint, was deposited into the account of Lowe Service at the First Jersey National Bank, Newark, New Jersey.

42. On or about May 10, 1982, the Commission staff member who mailed a check to Lowe Publishing received by mail a letter on the letterhead of *LIFL*, acknowledging his subscription to the *LIFL*. According to the letter, *LIFL* subscribers could "look forward to specific recommendations regarding securities." This letter listed LMC as the publisher of the *LIFL*.

Lowe's New Jersey State Criminal Convictions

43. On October 28, 1981, a criminal indictment was returned against Lowe by a grand jury in Union County, New Jersey charging Lowe with two counts of theft by deception (third degree).

44. On January 14, 1982, Lowe was convicted by his plea of guilty to Counts One and Two of said indictment for Theft by Deception in the Third Degree, in that Lowe

knowingly and falsely represented to two New Jersey banks that various checks drawn on (a) the account of Lowe at the Escondido National Bank, Escondido, California, (b) the accounts of Lowe and Lowe Publishing at the First National State Bank, Westfield, New Jersey, and (c) the account of Lowe Publishing at the Central Jersey Bank and Trust Company, Westfield, New Jersey, were good and negotiable, when, in fact, Lowe knew said checks were not good and negotiable (N.J. Stat. Ann. §2c:20-4).

45. On February 19, 1982, following his plea of guilty, Lowe was sentenced to three years imprisonment on each count to be served concurrently. In addition, Lowe was ordered to make restitution in the amount of over $27,000 to the two New Jersey banks, according to a weekly repayment schedule. He was incarcerated at the conclusion of the sentencing hearing, but, on or about April 30, 1982, was released on bail, pending appeal.

46. The pre-sentence report filed in connection with Lowe's sentencing on February 19, 1982, and prepared by the Union County Probation Office, contained information relating to Lowe's publishing business. Lowe advised the Probation Office that he was in the publishing business and that his advisory publications have between 4,000 and 5,000 subscribers. A copy of the December 11, 1981 *LIFL* and a copy of a *Lowe Stock Chart Service* advertising flyer and subscription form were submitted to the Court at the time of Lowe's sentencing.

First Cause of Action

Violations of Section 203(a) of the Advisers Act, 15 U.S.C. §80b-3(a)—Failure to Comply With the Registration Provisions of the Advisers Act

47. Plaintiff Commission realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 46 of this Complaint.

48. Since on or about May 11, 1981, as described in paragraphs 27 through 46 of this Complaint, defendants Lowe, Lowe Publishing, LMC and Lowe Service have been and are now, for compensation, engaged in the business of advising others, through publications, as to the advisability of investing in, purchasing, or selling securities and, for compensation and as part of a regular business, have been and are now, issuing reports concerning securities.

49. As part of the aforesaid conduct, defendants Lowe, Lowe Publishing, LMC and Lowe Service have sought and are now seeking subscribers to *LIFL* and the *Lowe Stock Stock* [*sic*] *Chart Service* through unsolicited nationwide mailings.

50. In connection with their advisory business, as described in paragraph 48 of this Complaint, defendants Lowe, Lowe Publishing, LMC and Lowe Service have been, and are now, making use of the mails and the means or instrumentalities of interstate commerce.

51. Since on or about May 11, 1981, no application for registration as an investment adviser has been filed with the Commission, or is in effect, with respect to defendants

Lowe, Lowe Publishing, LMC or Lowe Service, as required by Section 203 of the Advisers Act, 15 U.S.C. §80b-3, and no exemption from registration is available, pursuant to Section 203(b) of the Advisers Act, 15 U.S.C. §80b-3(b).

52. By reason of the foregoing, defendants Lowe, Lowe Publishing, LMC and Lowe Service have violated and aided and abetted violations of, are violating and are aiding and abetting violations of, and, unless enjoined, will continue to violate and aid and abet violations of, Section 203(a) of the Advisers Act, 15 U.S.C. §80b-3(a).

Second Cause of Action

Violations of Section 206(1) of the Advisers Act, 15 U.S.C. §80b-6(1)—Fraud in the Solicitation and Sale of Investment Advisory Publications

53. Plaintiff Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 52 of this Complaint.

54. Since on or about May 11, 1981, defendants Lowe, Lowe Publishing, LMC and Lowe Service, by use of the mails and the means or instrumentalities of interstate commerce, directly or indirectly, have been and are employing devices, schemes or artifices to defraud clients or prospective clients, in violation of Section 206(1) of the Advisers Act, 15 U.S.C. §80b-6(1).

55. As part of and in furtherance of the violative conduct described in paragraph 54 of this Complaint, defendants Lowe, Lowe Publishing, LMC and Lowe Service, in publishing investment advice and soliciting subscriptions

for the *LIFL* and the *Lowe Stock Chart Service,* knowingly made untrue statements of material fact and knowingly omitted to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, concerning, among other things:

(a) defendant Lowe's bar from association with any investment adviser;

(b) the revocation of defendant LMC's investment adviser registration; and

(c) defendant Lowe's New Jersey state criminal convictions.

56. Defendants Lowe, Lowe Publishing, LMC and Lowe Service knew that:

(a) Lowe was barred from association with any investment adviser by order of the Commission;

(b) LMC's registration as an investment adviser was revoked by order of the Commission; and

(c) Lowe had been convicted of two counts of theft by deception in New Jersey.

57. By reason of the foregoing, defendants Lowe, Lowe Publishing, LMC and Lowe Service have violated and aided and abetted violations of, are violating and aiding and abetting violations of, and, unless enjoined, will continue to violate and aid and abet violations of, Section 206(1) of the Advisers Act, 15 U.S.C. §80b-6(1).

Third Cause of Action

Violations of Section 206(2) of the Advisers Act, 15 U.S.C. §80b-6(2)—Fraudulent Course of Business in the Solicitation and Sale of Investment Advisory Publications

58. Plaintiff Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 57 of this Complaint.

59. Since on or about May 11, 1981, defendants Lowe, Lowe Publishing, LMC and Lowe Service, by use of the mails and the means or instrumentalities of interstate commerce, directly or indirectly, have been and are engaging in transactions, practices or courses of business which have operated and are operating as a fraud or deceit upon clients or prospective clients, in violation of Section 206(2) of the Advisers Act, 15 U.S.C. §80b-6(2).

60. As part of and in furtherance of the violative conduct described in paragraph 59 of this Complaint, defendants Lowe, Lowe Publishing, LMC and Lowe Service, in publishing investment advice and soliciting subscriptions for the *LIFL* and the *Lowe Stock Chart Service,* have made untrue statements of material fact and have omitted to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, concerning, among other things:

(a) defendant Lowe's bar from association with any investment adviser;

(b) the revocation of defendant LMC's investment adviser registration; and

(c) defendant Lowe's New Jersey state criminal convictions.

61. By reason of the foregoing, defendants Lowe, Lowe Publishing, LMC and Lowe Service have violated and aided and abetted violations of, are violating and are aiding and abetting violations of, and, unless enjoined, will continue to violate and aid and abet violations of, Section 206(2) of the Advisers Act, 15 U.S.C. §80b-6(2).

Fourth Cause of Action

Violations of a Commission Order Imposing Remedial Sanctions—Enforcing Compliance Pursuant to Section 209(e) of the Advisers Act, 15 U.S.C. §80b-9(e)

62. Plaintiff Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 61 of this Complaint.

63. Since on or about May 11, 1981, defendant Lowe has been associated with, is associated with and, unless enjoined, will continue to associate with, an investment adviser in violation of an Order issued by the Commission on May 11, 1981, which bars Lowe from association with any investment adviser.

64. From on or about May 11, 1981 to the present, as described in paragraphs 27 through 46 of this Complaint, defendant Lowe has acted in the capacity of officer or director of (or performed similar functions), has directly or indirectly controlled, or has been an employee of, defendants Lowe Publishing, LMC and Lowe Service.

65. By reason of the foregoing, defendant Lowe has violated and is violating that portion of an order issued

by the Commission on May 11, 1981 pursuant to Section 203(f) of the Advisers Act, 15 U.S.C. §80b-3(f).

WHEREFORE, plaintiff Commission respectfully requests that this Court issue:

A. A Temporary Restraining Order, an Order of Preliminary Injunction and a Final Judgment of Permanent Injunction enjoining defendants Lowe, Lowe Publishing, LMC and Lowe Service, their affiliates, nominees, agents, officers, employees, servants, successors, attorneys, assigns, and those persons in active concert or participation with them, and each of them, directly or indirectly, by use of the mails or the means or instrumentalities of interstate commerce, for compensation:

(1) from engaging in the business of advising others, directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities; or

(2) as part of a regular business, from issuing or promulgating analyses or reports concerning securities;

in violation of Section 203(a) of the Advisers Act, 15 U.S.C. §80b-3(a).

B. An Order of Preliminary Injunction and a Final Judgment of Permanent Injunction enjoining defendants Lowe, Lowe Publishing, LMC and Lowe Service, their affiliates, nominees, agents, officers, employees, servants, successors, attorneys, assigns, and those persons in active concert or participation with them, and each of them,

directly or indirectly, by use of the mails or the means or instrumentalities of interstate commerce, from:

(1) employing any device, scheme or artifice to defraud any client or prospective client; or

(2) engaging in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client;

in violation of Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. §§80b-6(1) and 80b-6(2).

C. An Order of Preliminary Injunction and a Final Judgment of Permanent Injunction, pursuant to Section 209(e) of the Advisers Act, 15 U.S.C. §80b-9(e), enforcing compliance with an Order issued by the Commission on May 11, 1981, enjoining defendant Lowe from association with any investment adviser.

Plaintiff Commission further requests that this Court issue:

A. An Order directing defendants Lowe, Lowe Publishing, LMC and Lowe Service to disgorge all monies or proceeds received by them in connection with their investment advisory business since May 11, 1981.

B. An Order appointing an Escrow Agent to oversee disgorgement and, pursuant to a plan submitted by such Escrow Agent and approved by the Court, to distribute the disgorged monies or proceeds to all subscribers to defendants' investment advisory publications and whose compensation and other expenses shall be borne by the defendants and not deducted from any of those assets subject to disgorgement.

C. An Order restraining defendants Lowe, Lowe Publishing, LMC and Lowe Service, and each of them, their affiliates, nominees, agents, officers, employees, servants, successors, attorneys, assigns and those persons in active concert or participation with them, and each of them, from:

(1) transferring, pledging, assigning, dissipating, concealing or otherwise disposing of any assets, funds or other property presently held or owned by them or under their control; and

(2) destroying, mutilating, concealing, altering or disposing of any items, including, but not limited to, any books, records, documents, contracts, agreements, assignments, obligations, subscription lists, subscription order forms, correspondence or other property of the defendants herein;

until a plan of disgorgement is submitted to, and approved by, the Court.

D. An Order commanding defendants Lowe, Lowe Publishing, LMC and Lowe Service, within seven days from the date of entry of the Final Judgment and Order of Disgorgement, to file affidavits with the Court and Escrow Agent: (i) itemizing all of their assets, liabilities and business records; (ii) disclosing the location of those assets, liabilities and business records; and (iii) listing the names and addresses of each subscriber to the *LILF*, the *Lowe Stock Advisory* and the *Lowe Stock Chart Service* and the amount of subscription fees paid by each subscriber.

E. Such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,

/s/ Donald N. Malawsky

Donald N. Malawsky
Regional Administrator

Attorney for Plaintiff
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10278
Telephone: (212) 264-1636

Of Counsel:

Lawrence J. Toscano
Charles E. Padgett
S. Jane Rose
Thomas R. Hickey, Jr.

Answer

UNITED STATES DISTRICT COURT

Eastern District of New York

82 Civ. 1616 (JBW)

Securities and Exchange Comission,

Plaintiff,

against

Christopher L. Lowe
a/k/a Chris L. Lowe
Lowe Publishing Corporation
Lowe Management Corporation
Lowe Stock Chart Service, Inc.,

Defendants.

The defendants answer the complaint as follows:

1. Deny each and every allegation of paragraphs 1, 2, 4, 5, 52, 54, 55, 57, 59, 60, 61, 63 and 65.

2. Deny knowledge or information sufficient to form a belief as to the allegations of paragraphs 27, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41 and 42.

3. Deny each and every allegation of paragraph 3 to the extent it alleges that the Commission has legal authority to bring or maintain this action.

4. Deny each and every allegation of paragraph 6 to the extent it alleges that Lowe resides in Westfield, New Jersey, was barred from association with any investment advisor by order of the Commission or was convicted of larceny in New Jersey.

5. Deny each and every allegation of the first sentence of paragraph 7.

6. Deny each and every allegation of paragraph 13 except to the extent it alleges that prior to a date, not yet determined, in 1976 LMC managed funds of one or more clients and that during the alleged period, it published two publications, LIFL and Lowe Stock Advisory.

7. Deny each and every allegation of paragraph 14 to the extent it alleges that since 1981 LMC has maintained a business office in Westfield, New Jersey.

8. Deny each and every allegation of paragraph 28 except to the extent it alleges that an issue of LIFL dated August 21, 1981 was published by Lowe Publishing.

9. Deny each and every allegation of paragraph 33 except to the extent it alleges an issue of LIFL dated December 11, 1981 was published by Lowe Publishing and listed Lowe as research chairman and editor.

10. Deny knowledge or information sufficient to form a belief as to the allegations of paragraph 48 except deny that the defendants engaged in the alleged business of advising others, as described in paragraphs 44, 45 and 46.

11. Deny each and every allegation of paragraph 49 except to the extent it alleges that Lowe, Lowe Publishing and

LMC have sought and are now seeking subscribers to LIFL and that Lowe and Lowe Stock Chart Service have sought subscribers to the Lowe Stock Chart Services through nationwide mailings.

12. Deny each and every allegation of paragraph 50 except to the extent that the defendants have been, and are now, making use of the mails and the means or instrumentalities of interstate commerce.

13. Deny each and every allegation of paragraph 51 except to the extent it alleges that since on or about May 11, 1981, no application for registration as an investment advisor has been filed with the Commission or is in effect with respect to Lowe, Lowe Publishing, LMC or Lowe Service.

14. Deny each and every allegation of paragraph 56 except to the extent it alleges that the defendants knew the matters alleged in subparagraphs (b) and (c).

15. As to the allegations of paragraphs 10, 47, 53, 58 and 62, repeat paragraphs 1 through 14 hereof.

First Affirmative Defense

16. The defendants are publishers of bona fide business and financial publications of general and regular circulation and are thereby excluded from regulation by the definition of "investment adviser" set forth in §202(a)(11) of the Investment Advisers Act.

Second Affirmative Defense

17. The Investment Advisers Act sets forth unjustifiable and irrational exclusions from regulation in the definition

of "investment adviser" set forth in §202(a)(11)(D) thereof and thereby unjustifiably discriminates against defendants and deprives them of liberty and property without due process of law under the Fifth Amendment.

Third Affirmative Defense

18. The Investment Advisers Act, as sought to be applied to the defendants, and the relief sought in the complaint, violate the defendants' First Amendment rights of free press and free speech.

Fourth Affirmative Defense

19. The Investment Advisers Act, on its face, violates the First Amendment rights of free press and free speech of publishers of financial newsletters by, among other things, requiring licensing of such publishers in advance of publication.

WHEREFORE, the defendants demand that the complaint be dismissed, with costs.

Dated: New York, New York
July 8, 1982

SCHOEMAN, MARSH, UPDIKE & WELT
Attorneys for the Defendants
60 East 42nd Street
New York, New York 10165
(212) 661-5030

To:

DONALD N. MALAWSKY, ESQ.
Attorneys for Plaintiff
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10278

Stipulation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

82 Civ. 1616 (JBW)

SECURITIES AND EXCHANGE COMISSION,
Plaintiff,

against

CHRISTOPHER L. LOWE
a/k/a CHRIS L. LOWE
LOWE PUBLISHING CORPORATION
LOWE MANAGEMENT CORPORATION
LOWE STOCK CHART SERVICE, INC.,
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties that the defendants hereby admit for purposes of this action, pursuant to FRCP 36, as follows:

1. The Lowe Investment and Financial Letter ("LIFL"), has approximately 2,408 paid subscribers holding subscriptions whose terms vary between 3 months and at least 3 years and approximately 2,448 subscribers whose subscriptions have expired, but who continue to receive LIFL.

2. Copies of all issues of LIFL distributed in the period from May 11, 1981 to date have been furnished to the plaintiff.

3. Each issue was distributed on or about the date of such issue.

4. The LIFL issue distributed in August 1981 was mailed to approximately 3,300 persons; the issue distributed December 11, 1981 was mailed to approximately 19,000 persons; subsequent issues were mailed to between 4,500 and 5,000 persons.

5. The Lowe Stock Advisory ("LSA") has approximately 278 paid subscribers and approximately 397 subscribers who have not paid.

6. Copies of all issues of LSA distributed in the period from May 11, 1981 to date have been furnished to plaintiff.

7. Each issue was distributed on or about the date of such issue.

8. Each LSA issue has been mailed to between 400 and 700 persons.

9. The Lowe Stock Chart Service ("LSCS") has approximately 44 paid subscribers.

10. Since June 8, 1982, 9 LSCS subscriptions were refunded of which 4 were converted by the subscribers to LIFL subscriptions.

11. In the period from May 11, 1981 to date, no issues of LSCS have been distributed.

12. Each corporate defendant makes use of the mails and instrumentalities of commerce in connection with the solicitation of its subscribers and, except in the case of Lowe Stock Chart Service Inc. makes use of the mails and instrumentalities of commerce in connection with the distribution of materials.

13. None of the defendants has told any paid subscribers of the existence of the plaintiff's order of May 11, 1981 or the terms thereof or of the convictions of defendant Chris L. Lowe alleged in the complaint, except that the defendants have informed not more than 20 other newsletter publishers (who may or may not be paid subscribers) of such facts.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties as follows:

A. On or before Tuesday, August 24, 1982, the corporate defendants will furnish plaintiff with the names of a total of 75 additional paid subscribers in the New York area whose names have not previously been furnished by them, (including subscribers for each publication in the appropriate ratios of the total paid subscribers for each publication, to the extent practicable).

B. Plaintiff's motion to compel discovery shall be withdrawn forthwith.

Dated: New York, New York
August 20, 1982

SCHOEMAN, MARSH, UPDIKE & WELT

By /s/ MICHAEL E. SCHOEMAN

Attorneys for defendants
60 East 42nd Street
New York, New York 10165

/s/ S. JANE ROSE

S. JANE ROSE
Attorney for Securities and
Exchange Commission
26 Federal Plaza
New York, New York 10278

Transcript of Trial

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 82 1616

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

against

CHRISTOPHER L. LOWE, *et al.*

Defendant.

United States Courthouse
Brooklyn, New York
September 13, 1982
10:00 A.M.

Before:

HONORABLE JACK B. WEINSTEIN, CHIEF U.S.D.J.

• • •

[23]
The Court: All right.
Call your witness.
Ms. Rose: The Government calls as its first witness, Richard Mayer.

The Court: This is Government's Number 1 to 40 in Evidence; right?

Ms. Rose: Yes.

[24] RICHARD A. MAYER, a witness called herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Ms. Rose:

Q. Good afternoon, Mr. Mayer.

Would you tell the Court what is your address, sir?

A. My address?

It is 2800 Gerard Avenue South, Apartment 110, Minneapolis, Minnesota, 55408.

Q. How are you employed, Mr. Mayer?

A. I am retired.

Q. How were you employed, sir?

A. I previously was an electrical contractor.

Q. Have you ever heard of the Lowe Investment and Financial Letter?

A. Yes, I have.

Q. Can you tell us what is the Lowe Investment and Financial Letter?

A. It is an investment advisory service to help people with their investments, to guide them through and select the proper securities for investment.

[25] Q. When did you first hear of the Lowe Investment and Financial Letter?

A. In February of 1979.

Q. Can you tell us under what circumstances you first heard of the Lowe Investment and Financial Letter?

A. I received a letter from the Lowe Management Corporation notifying me that they had purchased the rights to a subscription that I had with the Wall Street Advisor.

They had been selected to take over that subscription and they were going to continue the rest of the subscription and add three additional months as an inducement to remain.

Q. Did you ever receive the Lowe Investment and Financial Letter?

Mr. Schoeman: Your Honor, I will object to this. The complaint starts with May 1981.

I don't know why we are going two years earlier than that. It seems to be improper.

The Court: Overruled, I will hear it.

Q. When did you first receive the Lowe Investment and Financial Letter?

A. I received the first issue in March 1979.

Q. Did you ever have occasion to extend your subscription to the Lowe Investment and Financial Letter, [26] Mr. Mayer?

A. Yes. They made a number of offers to add to the subscription that they had taken over.

I subsequently renewed.

Q. When did you renew your subscription?

A. I renewed my subscription in August of 1979.

Q. Can you tell us what the terms of that subscription were?

A. The subscription was for three years at twice a month for $75.

Q. Are you currently a subscriber to the Lowe Investment and Financial Letter?

A. Well, I have a large amount of my unexpired term due me.

Q. Can you tell us, Mr. Mayer, for what purpose did you subscribe to the Lowe Investment and Financial Letter?

A. I subscribed to the letter to receive the advice that I needed for investments.

Q. Do you invest in securities, sir?

A. Yes, I do.

Q. Have you ever purchased any securities which were recommended by the Lowe Investment and Financial Letter?

A. No, I didn't because the letter was very [27] sporadic and delivery was undependable and I couldn't form opinions because of the inconsistencies of delivery.

Q. Can you tell us, sir, whether you have received any issues of the Lowe Investment and Financial Letter since May of 1981?

A. Yes, I have.

Q. Can you tell me, sir, how many issues of the Lowe Investment and Financial Letter did you receive in 1981 after May 11th?

A. I received one complimentary interim bulletin and one regular advisory letter.

Q. Do you recall when you received those issues, sir?

A. Yes.

I received the complimentary bulletin in August of '81, and the regular advisory letter in December '81.

Q. Mr. Mayer, I would like to show you Government's Exhibit 7 and 8 in Evidence.

Do you recognize Government's Exhibit 7 and 8, Mr. Mayer?

(Witness examining document.)

A. Yes, I do.

Q. Have you seen them before?

[28] A. Yes, these are copies of the ones that I received.

Q. Are those copies of the issues of the Lowe Investment and Financial Letter that you received in 1981, sir?

A. Yes, they are.

[29] Q. Can you tell us, sir, how many issues of the Lowe Investment and Financial Letter you have received in 1982?

A. I received approximately—in May a notification that publication would resume and subsequently starting in June '82, I received a total of 5 regular market letters.

Q. Did you receive any market letters between December of 1981 and June of 1982?

A. No.

Q. Mr. Mayer, I now show you 5 documents which are Government's Exhibits 9, 10, 11, 12, and 13 in Evidence.

Do you recognize those documents, sir?

(Witness examining documents.)

A. Yes, I do.

Q. Can you tell us what they are?

A. These are the regular market advisory letters published by the Lowe Investment and Financial Letter, the Lowe Stock Advisory Corporation.

Q. Are those copies of the letters, sir, that you received from the Lowe Investment and Financial Letter?

A. Yes.

Q. Can you tell us when you received those issues?

A. I received them in June and July and August of [30] this year, 1982.

Q. How did you receive them, sir?

A. By mail.

Q. Mr. Mayer, have you ever heard of the Lowe Stock Advisory?

A. Yes, I have.

Q. Can you tell us what the Lowe Stock Advisory is?

A. It is an advisory service which supposedly recommends low-price stocks to investors.

Q. How did you first hear of the Lowe Stock Advisory?

A. I received several subscription offers in the mail with my regular advisory letter.

Q. Did you ever subscribe to the Lowe Stock Advisory?

A. Yes.

I received an offer for a free six-issue subscription in late-summer of '81.

Q. I will show you what has been marked as Government's Exhibit 15 which is in evidence.

Have you seen Government's Exhibit 15 before today?

(Witness examining document.)

[31] A. Yes, I have.

This is the free six-issue trial subscription offer that I received and I sent in the coupon to receive the free trial.

Q. Did you send a copy of the Government Exhibit 15 to the plaintiff Commission?

A. Yes.

Q. Have you received any other solicitations from those stock advisories, sir, other than Government's Exhibit 15?

A. Yes, earlier than that I received several subscription offers.

Q. Did you ever receive any issue of the Lowe Stock Advisory?

A. In November of '81, I received a complimentary interim bulletin.

Q. I show you, sir, Government's Exhibit 19 in Evidence.

Do you recognize that document, sir?

(Witness examining document.)

A. I do.

Q. Can you tell us what it is?

A. This is a complimentary interim bulletin of the Lowe Stock Advisory.

[32] Q. Have you seen that bulletin prior to today?

A. Yes.

Q. Is that a copy of the bulletin that you received from the Lowe Stock Advisory?

A. Yes, it is.

Q. Can you tell us when you received it?

A. I received in November, shortly after the date on this advisory.

Q. Is that November of 1981?

A. November 16, 1981, is the date on this advisory.

Q. Thank you.

Mr. Mayer, do you recall receiving any other solicitations from Lowe Stock Advisory?

A. In July of 1982, I received a notification that the publication and the Lowe Stock Advisory was going to resume an offering to recommend or offer extensions to the subscription.

Q. I show you Government's Exhibit 39 in Evidence, sir.

Have you seen that document prior to my handing it to you?

(Witness examining document.)

A. Yes, I have.

[33] Q. Can you tell us what is it.

A. It is an announcement by the Lowe Stock Advisory that they would resume publication of the Lowe Stock Advisory effective with the 8th of July, 1982 issue.

Q. When did you first see that document?

A. I saw it shortly after the date shown here in July 1982.

Q. Have you ever heard of the Lowe Stock Chart Service?

A. Yes, I have.

Q. Can you tell us what the Lowe Stock Chart Service is?

A. The Lowe Stock Chart Service is a publication with a considerable number of charts in it of the stocks on the New York Stock Exchange and the American Stock Exchange and some over-the-counter stocks.

Q. Can you tell us, sir, under what circumstances you first heard of the Lowe Stock Chart Service?

A. I had some subscription offers included with the regular advisory service I was getting.

These were about late-1980 and early-1981.

Q. I show you Government's Exhibit 20 in Evidence.

Have you seen that document prior to my handing it to you?

[34] (Witness examining document.)

A. Yes.

Q. Would you tell us what it is?

A. This is an offer for a subscription to the Lowe Stock Chart Service.

Q. When did you first see that document?

A. Late-1980.

Q. Mr. Mayer, did you ever purchase a subscription to the Lowe Stock Advisory?

A. No, I didn't.

Q. For what reason did you not purchase a subscription to the Lowe Stock Advisory?

Mr. Shoeman: Objection.

The Court: I will permit it.

You may answer.

A. Because the delivery of the publications from Lowe Management Corporation was very undependable and because I hadn't gotten the market letters that I expected as regularly as they should have been and I did not want to pour good money after bad because I still hadn't gotten a complete fulfillment of my subscription to the Lowe Investment and Financial Letter.

Q. Mr. Mayer, do you know if Lowe Management Corporation was ever registered with the Securities and [35] Exchange Commission as an investment advisor?

A. Yes.

Q. How did you learn that Lowe Management Corporation was registered with the Securities and Exchange Commission as an investment advisor?

A. Because in the very first letter that I received from them, at the top of the letter they said, "Investment Advisors" and on the publication they sent, at the bottom it said "Registered Investment Advisor".

Q. Sir, were you ever informed that the investment advisor registration of Lowe Management Corporation was revoked by order of the Securities and Exchange Commission in May of 1981?

A. Notified by whom?

Q. Were you notified by anybody that the registration of Lowe Management Corporation, as an investment advisor, was revoked?

A. I wasn't automatically notified. I wrote to the Securities and Exchange Commission to find out what was going on with the firm and they notified me then that his license had been revoked.

Q. Did Lowe Management Corporation, Mr. Lowe, Lowe Publishing Corporation or Lowe Stock Chart Service or the Lowe Investment and Financial Letter or Lowe Stock [36] Advisory ever inform you, sir, that the registration of Lowe Management Corporation, as an investment advisor, was revoked by the Securities and Exchange Commission's order?

A. Never.

Q. Would the revocation of Lowe Management Corporation, registration as an investment advisor, had been a fact which you would have considered in deciding whether or not to subscribe to the Lowe Investment and Financial Letter, the Lowe Stock Advisory or the Lowe Stock Chart Service?

Mr. Schoeman: I object, your Honor, as leading.

The Court: I will permit it.

A. Yes, it would have influenced my decision.

Q. Were you ever informed, sir, by any of the defendants in this action or by any of their publications, that is by the Lowe Investment and Financial Letter, the Lowe Stock Advisory or the Lowe Stock Chart Service that in May of 1981 the Commission issued an order which barred Christopher Lowe from being associated with any investment advisor?

A. Never.

Q. Would the fact that the Commission had issued [37] such an order have been something you would have wanted to consider in deciding whether or not to subscribe to Lowe Investment and Financial Letter, the Lowe Stock Advisory, or the Lowe Stock Chart Service?

A. Yes.

Mr. Schoeman: Same objection, your Honor.

The Court: I will permit it.

A. Yes, it would.

Q. Were you ever informed, Mr. Mayer, by the defendants or by the Lowe Investment and Financial Letter, the Lowe Stock Advisory or the Lowe Stock Chart Service that Christopher Lowe was convicted in New Jersey of two counts of theft by deception in 1982?

A. No.

Q. Would the fact of Mr. Lowe's convictions have been a factor you would have wished to take into account in deciding whether or not to subscribe to the Lowe Stock Advisory or the Lowe Investment and Financial Letter?

Mr. Schoeman: Same objection, your Honor.

The Court: Overruled.

A. Yes.

Q. Would you had subscribed to the Lowe Investment and Financial Letter or the Lowe Stock Advisory had you [38] been informed of Mr. Lowe's conviction?

A. No.

I would not have subscribed.

Ms. McKenzie [*sic*]: I have no further questions of Mr. Mayer.

(Pause)

[39] *Cross-examination by Mr. Schoeman:*

Q. Mr. Mayer, is it correct that you sent at least one letter to the Commission?

A. Yes, I did.

Q. How many did you send to the Commisison?

A. Altogether?

Q. Yes.

A. Two, I believe.

Q. Did those letters describe in any way your dealings with any of the defendants?

A. Yes.

Mr. Schoeman: Your Honor, we would like production of those letters under 3500, the Jencks Act.

The Court: Well, it is not exactly a 3500 material problem, but do you have the letters?

Ms. Rose: I have no problems with providing the letters. We did give Mr. Schoeman some documents today. I think these were inadvertently missing.

Mr. Schoeman: I have them right here, your Honor.

The Court: Have they been marked for identification?

[40] Ms. Rose: No, sir.

The Court: All right, why don't you mark the whole folder for identification as a Defendant's Exhibit.

Mr. Schoeman: May I just have a minute to read it, your Honor?

The Court: Yes. Had you used any numbers for the Defendant's Exhibits yet?

Mr. Schoeman: Well, this would be A, your Honor.

The Court: This is A.

How long are you going to be because I can do a little work in chambers if you are going to be long.

Mr. Schoeman: Sir, is that addressed to me?
The Court: How long will you be?
Mr. Schoeman: On cross?
The Court: No, on the file.
Mr. Schoeman: Well, I read the first three pages, Judge. There are another 15 or so.
The Court: All right, we will take a five minute recess so I can get some work done.
(Whereupon, a recess was taken.)

[41] *Cross-examination by Mr. Schoeman*: (Continued)

Q. Mr. Mayer, you subscribe to a number of other financial newsletters; do you not?
A. Yes, I do.
Q. About 15 or 16 of them?
A. Yes.
Q. Do you like the quality of the Lowe Investment Financial Letters that you received?

Ms. Rose: Objection.
The Court: Overruled.

A. At first I did.
Q. What did you like about them at first?
A. I liked his reporting of the stock market behavior. I liked the market indicator charts that he included for a period of time and I was beginning to get acquainted with the service until it became sporadic and inconsistent deliveries.
Q. Looking at Exhibit 9 through 13, did you like those?

(Witness examining document.)

A. I didn't read these letters. I disregarded them because of the inconsistent delivery. I was unable to use them for a basis to make decisions for investment so [42] I never read these letters.
Q. If you were to continue to receive letters on a regular basis, would you read them, that is, the Lowe letters?

A. Yes, that's why I subscribed to investment advisory letters.
Q. Would you like to continue to receive them?
A. If they were delivered on a regular basis and if I got the rest of my subscription, I would if he were a registered investment advisor.
Q. With respect to the one qualification you have made, if he were a registered investment advisor, is it your assumption in making that condition that the Commission has the power to prevent someone from publishing a newsletter if he is not registered?
A. Yes.

Mr. Schoeman: No further questions.
The Court: All right, next witness please.
Thank you, you can go back home, sir.
Ms. Rose: The Government calls Thomas Biolsi.

THOMAS ANTHONY BIOLSI, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

[43] *Direct Examination by Mr. Hickey:*

Q. Good afternoon, Mr. Biolsi.
What is your home address, please?
A. My home address is 88-597 16th Avenue, Brooklyn, New York.

The Court: I thought you said you had two witnesses from out of town?
Ms. Rose: Mr. Biolsi has to testify at a trial in Michigan tomorrow.
The Court: Well, you better be prompt because you only have 35 minutes direct and cross.
Ms. Rose: The other witnesses are residents of the Greater New York area, your Honor.
The Court: All right.

Q. Mr. Biolsi, how are you employed?

A. I am a securities compliance examiner in the branch of Investment Advisor Examinations assigned to the New York office of the United States Security and Exchange Commission.

Q. Have you ever heard of the Lowe Investment and Financial Letter?

A. Yes, I did.

Q. Under what circumstances did you first hear [44] of the Lowe Investment and Financial Letter?

A. In February of this year I was asked by my superiors to subscribe to the Lowe Investment and Financial Letter to which I did for which I was reimbursed the $39 fee for the subscription by the Commission.

Q. But what reason were you asked to subscribe to the Lowe Investment and Financial Letter?

A. I was asked to subscribe to see if Mr. Lowe was still conducting business as an investment advisor after his bar that the Commission had placed against him back in 1981.

Q. Did you ever subscribe to the Lowe Investment and Financial Letter?

A. Yes, I did. In March of this year I sent away a copy of the subscription form along with a letter, along with a check from my own personal checking account for $39 for a one year subscription to the Lowe Investment and Financial Letter.

Q. Mr. Biolsi, I show you now what has been marked as Government's Exhibit 14 in evidence.

I ask you if you recognize that document, sir?

(Witness examining document.)

A. Yes, this is the subscription blank of which [45] we made the copy and filled it out and sent it in as part of my subscription to the Lowe Investment and Financial Letter.

Q. Mr. Biolsi, I show you now a document which has been marked as Government's Exhibit 22 in evidence and ask you if you recognize that?

(Witness examining document.)

A. Yes, I do.

This is the February 28, 1982 letter that I wrote up and sent along with my subscription blank and my check to the Lowe Investment and Financial Letter.

Q. Mr. Biolsi, I now show you Government's Exhibits 23 and 24 and ask you if you recognize those documents?

(Witness examining documents.)

A. Yes, I do.

This is a copy of my subscription blank that was sent to the Lowe Investment and Financial Letter in March of 1982 along with my check made out to Lowe Publishing Company for $39.

Q. What is the date of that check, sir?

A. March 2, 1982.

Q. Mr. Biolsi, I ask you to look at Government's Exhibit 24 in evidence.

[46] Are there any other markings on that particular exhibit other than those that are made by your own hand?

(Witness examining document.)

A. Yes, on the back it has been marked "For deposit only Lowe Publishing Corporation account number 18-10-57227" and then there is another mark from a First Jersey National Bank.

Q. Were Government's Exhibit numbers 22, 23, and 24 in evidence mailed by you on or about March 2, 1982?

A. That's correct. I mailed it from a mailbox in Brooklyn.

Q. Thank you.

Mr. Biolsi, what, if anything, did you receive for your Lowe Investment and Financial Letter subscription?

A. Well, I didn't receive anything in March. I didn't receive anything in April. In May I received a letter from

Lowe Investment and Financial Letter stating that they had received my subscription and that I would soon be receiving my copies of the newsletter.

Q. I now show you Government's Exhibit 25 in evidence and ask you if you recognize that document?

A. Yes. This is the letter I received on or about May 10, 1982 at my home from Lowe Investment and [47] Financial Letter.

Q. Mr. Biolsi, how many issues of the Lowe Investment and Financial Letter did you receive?

A. I received two in June, two in July and one in August in 1982.

Q. I show you now Government's Exhibit numbers 9, 10, 11, 12 and 13 in evidence and I ask you if you recognize those?

(Witness examining document.)

A. Yes. Exhibit 9 is the one I did receive in the early part of June.

Exhibit 10 also the one I received in June.

Exhibit 11 is the one I received in July.

Exhibit 12 is the one I also received in July and Exhibit 13 is the one I received later on in August.

Q. Do Government's Exhibits 9, 10, 11, 12 and 13 constitute the only issues of the Lowe Investment and Financial Letter that you received during the course of your subscription?

A. That's correct.

[48] Q. Mr. Biolsi, have you heard of the Lowe Stock Advisory?

A. Yes, I have heard of it.

Q. Under what circumstances did you first hear of it?

A. Well, in July of this year I was again asked by my superiors at the Commission to subscribe to the Lowe Stock

Advisory for one year, similar to the circumstances of the Lowe Investment and Financial Letter.

Q. Mr. Biolsi, I now show you Government's Exhibit numbers 26, 27, and 28 in evidence and I ask you if you recognize those documents?

(Witness examining documents.)

A. This Exhibit 26 is my letter to Lowe Stock Advisory back in July of this year.

Exhibit 27 is the subscription blank that I filled out for the Lowe Stock Advisory.

Exhibit 28 is my check that was returned to me stamped, "cancelled," to Lowe Publishing Corporation.

Q. Did you mail Exhibits 26, 27 and 28 to the Lowe Stock Advisory on or about July 15, 1982?

A. Yes, I did.

Q. What, if anything, did you receive from Lowe Stock Advisory after you mailed in your subscription?

[49] A. Well, in August, 1982, I received a letter back from Lowe Publishing Company also with my check enclosed and a letter said that they were thankful that I subscribed to the service—

Mr. Schoeman: Objection, your Honor. The letter is in evidence, it speaks for itself.

The Court: Yes.

A. I received the letter and I received my check marked cancelled on the back from Lowe Publishing Corporation.

Mr. Hickey: Your Honor, we didn't hear what you said.

The Court: I can't hear you.

Mr. Hickey: I couldn't hear what you said.

The Court: What is the problem?

Ms. Rose: You had made a comment a moment ago and we did not hear what you said?

The Court: It wasn't of any importance, I am sure. Let's move ahead.

What is this about anyway? I don't understand why we are getting this evidence. Is this to show that they were mailing out these bulletins and things?

Mr. Hickey: Yes, your Honor.

[50] The Court: Well, they put all of this in evidence. What's the point of this?

Mr. Hickey: Well, your Honor, we are addressing the issue regarding the regularity or lack thereof of the—

The Court: Why don't you ask him to stipulate when these things were actually mailed and I am sure they will tell you. There is no question about any of this. Why are we wasting our time?

Just tell us what you want to prove and they will say they agree and that's it.

Q. Mr. Biolsi, during the course of your subscription to the Lowe Investment and Financial Letter, were you ever told by Lowe Publishing Corporation, Lowe Investment and Financial Letter or Christopher Lowe that Mr. Lowe had been barred from being associated with any investment advisor by the Commission's order dated May, 1981?

A. No, I was not.

Q. Were you ever told by the Lowe Investment and Financial Letter or Lowe Publishing Corporation or Mr. Lowe that Lowe had been convicted of two counts of theft in New Jersey this year?

[51] A. No, I was not.

Mr. Hickey: No further questions.

The Court: Cross examine.

Mr. Schoeman: Are there any 3500 materials for this witness?

Ms. Rose: No, there are not.

Cross-examination by Mr. Schoeman:

Q. Mr. Biolsi, who gave you the instructions the first time when you first wrote in to the Lowe Investment—

A. Do you want the names?

Q. Yes, the names.

A. They were two individuals. Mr. Charles Paget and Mr. Frank Morrison.

Q. When you wrote in, did you say, "I am interested in receiving the newsletter to broaden my investment horizon"?

A. Can I see the letter, sir?

(Document handed to the witness.)

A. Yes, sir.

Q. That wasn't true, was it?

A. No, it was not, sir.

Q. I didn't hear your answer?

A. No, it was not, sir.

[52] Q. Did you rely on the Lowe Investment Letter for any investment decisions you made?

A. No, I did not, sir.

Q. Do you subscribe to other newsletters, financial newsletters?

A. No, I do not, sir.

Mr. Schoeman: No further questions.

The Court: Thank you, sir.

What are the other witnesses going to say, maybe we can stipulate.

Ms. Rose: Basically they will say that they received the publication from the defendant on the

erotic [*sic*] basis; that they were not told of the bar of the revocation or of defendant Lowe's criminal conviction and had they been told that defendant Lowe had been barred from the Commission, had been convicted or that the registration of Lowe Management Corporation had been revoked, they would have wanted additional information and perhaps they would not have subscribed.

The Court: You're not going to object to any of that, that's clear.

Mr. Schoeman: Well, the last part of it, Judge, I think I don't agree with. The publications, [53] we have turned over the publications during discovery. They have all—

The Court: They have the dates of mailing?

Mr. Schoeman: I think they got that from the printers, but I am not sure.

The Court: All right. Well then, there is no question about it if there is a stipulation—is there any doubt that if they had known that this man had been convicted of fraud, or if he had been barred, they would have wanted more information?

Mr. Schoeman: He was not convicted of fraud, your Honor.

The Court: Or whatever.

Mr. Schoeman: Or whatever but not fraud.

Yes, I have some doubt about that.

The Court: You do, all right.

Are these other witnesses standing by?

Ms. Rose: They are out in the hall, your Honor.

The Court: Bring them in and just let them be subjected to cross examination. Everything else is stipulated to, I would think.

Bring them in and let him cross examine them.

[54] Ms. Rose: Okay.

The Court: One at a time.

We agree we can get them all finished very quickly. Next witness, please.

Ms. Rose: We will call Robert Burns.

ROBERT BURNS, called as a witness, having been first duly sworn by the Court, was examined and testified as follows:

The Court: You were a subscriber to some of these Lowe publications?

The Witness: Yes.

The Court: Did you know that he had ever been convicted of anything?

The Witness: No.

The Court: Did you know that he had been barred as an investment advisor?

The Witness: No.

The Court: Would you have wanted to know that?

The Witness: I think so, yes.

The Court: Pardon?

You would, all right.

Cross examine.

[55] *Cross-examination by Mr. Shoeman:*

Q. Mr. Burns, you're not a subscriber of the Lowe Investment and Financial Letter; are you?

A. That's right

May I?

Mr. Schoeman: No further questions.

The Court: What relationship did you have to these?

The Witness: My mother and myself, my mother is actually the person who wrote the check and—

The Court: But you read them and relied on them?

The Witness: Yes, it was at my suggestion that my mother subscribed.

The Court: Do you want to question him further?

Mr. Schoeman: Yes.

Q. Did you receive issues of the Lowe Financial Letter which have been marked as Exhibits 9, 10, 11, 12 and 13?

(Witness examining documents.)

A. I have not received Exhibit 9. I have not [56] and I did receive 10, 11, 12 and 13.

Q. You did or you did not?

A. I did.

Q. Did you read them?

A. Yes.

Q. Did you like them?

A. I felt there was a certain—a possible inconsistency.

Q. In the advice?

A. Yes.

Q. Did you like the way they were written?

A. I like the first letter that was written more than any of the others.

Q. Would you like to continue to receive them?

A. No.

Q. Have you relied on the Lowe Investment Letter in making investment advice?

A. No, I haven't.

Mr. Schoeman: No further questions.

The Court: Thank you, sir.

Next witness, please.

Ms. Rose: The Government calls Alvira Haden.

[57] ALVIRA HADEN, called as a witness, having been first duly sworn by the Court, was examined and testified as follows:

The Court: Did you subscribe to some of these Lowe documents?

The Witness: Yes, I did subscribe to the Lowe Financial Letter.

The Court: Did you know that he had been convicted of something?

The Witness: No, I did not.

The Court: Did you know that he had been barred by the SEC as an advisor?

The Witness: No.

The Court: Would you have wanted to know that?

The Witness: I think so. If you're investing your money, you would want to know.

The Court: All right, you may examine.

Cross-examination by Mr. Schoeman:

Q. Mrs. Haden, you see in front of you Exhibits 9 through 13. Did you receive those?

(Witness examining documents.)

A. Yes, I did.

[58] I got the June, July and August.

Q. Did you read them?

A. I skimmed through them, yes.

Q. Did you subscribe to other financial newsletters?

A. Yes, I do.

Q. How many?

A. Probably four or five.

Q. Did you form an opinion about the quality of those exhibits that are in front of you?

A. I thought it was a fine letter. I had nothing against the letter itself.

Q. If the letter were to be published on a regular basis, would you like to continue to receive it?

A. Well, if it was published on a regular basis, I would take it for comparison with some of the other things I get but I haven't been getting it very often.

Q. But on the assumption that—just on the assumption now that it were to be published on a regular basis, you would like to continue to get it; is that correct?

A. I think I would probably want to continue getting it if—I used it mostly as a comparison with other ones.

[59] Mr. Schoeman: Thank you, no questions.

The Court: Thank you Ma'am, next witness please.

Mr. Rose: Next witness Janice Arahill.

JANICE ARAHILL, called as a witness, having been first duly sworn by the Court, was examined and testified as follows:

The Court: Do you subscribe to some of these Lowe publications?

The Witness: Yes, one.

The Court: One, which one is that?

The Witness: The Advisory.

The Court: Do you know he had been convicted of something?

The Witness: No, I did not.

The Court: Were you aware that he had been barred by the SEC as an advisor?

The Witness: No, I did not.

The Court: Would you have wanted to know that?

The Witness: I would have wanted to know all of the facts.

The Court: All right.

Cross examine.

[60] *Cross-examination by Mr. Schoeman:*

Q. Mrs. Arahill, my name is Michael—

A. It is Miss Arahill.

Q. My name is Michael Schoeman and I am the attorney for the defendant.

You see in front of you Exhibits 9 through 13; do you see them?

(Witness examining documents.)

A. Yes.

Q. Did you receive those?

A. I will let you know if I received all of them.

Q. Would you just look through them and see if you received them?

A. I did not receive June 4th. I received June 18th. I did not receive July 7th. I received July 23rd. I have August 31st.

Q. Do you remember speaking with Mr. Hickey on August 24, 1982 in the morning?

A. Yes.

Q. He is the man from the SEC, the gentleman sitting here.

Do you remember telling him that you received [61] two issues of the Lowe Investment and Financial Letter in June?

A. As I look through June 4th, I had paid for my newsletter in January and I didn't receive any until June.

Q. But how many did you receive in June; if you remember?

A. I gave him what I had.

Q. Do you remember if you received one or two in June; that's what I am asking you?

A. Looking through the June 4th, I don't remember the information in June 4th.

Q. Did you read any of those publications—excuse me, any of these issues that you did receive?

A. Yes.

Q. Do you subscribe to other newsletters issued by financial publishers?

A. Yes, I do.

Q. How many others do you subscribe to?

A. Maybe about four.

Q. Do you have any opinion of the quality of the four issues that are in front of you that you did receive?

A. The quality is good so long as I have the [62] information there if I wanted to sell—if it was regular.

Q. If you were to receive the publication on a regular basis, would you like to continue to get it?

A. Yes.

Mr. Schoeman: No further questions.

The Court: Thank you, Ma'am.

How many more witnesses?

Ms. Rose: There are two more.

The Court: Well, are they going to say anything from what these witnesses are saying?

Ms. Rose: Not substantially different testimony, your Honor. They will say that they did not receive the newsletter regularly and they were not told and they probably—they may not want to continue the subscription with knowledge that Mr. Lowe had been convicted of crimes.

The Court: It seems to me it is cumulative. We have enough; don't we?

Mr. Schoeman: I would think so, your Honor.

The Court: Yes, this is cumulative.

The Government rests?

Ms. Rose: The Government rests, your Honor.

[63] The Court: Any evidence from the defendant?

Mr. Schoeman: No, sir.

The Court: And it rests?

The trial is completed.

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Judgment of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FILED
In Clerk's Office
U.S. District Court E.D.N.Y.
February 3, 1983

CV 82-1616 (JBW)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

against

CHRISTOPHER L. LOWE a/k/a CHRIS L. LOWE,
LOWE PUBLISHING CORPORATION,
LOWE MANAGEMENT CORPORATION,
LOWE STOCK CHART SERVICE INC.,

Defendants.

A memorandum and order of Honorable Jack B. Weinstein, United States District Judge having been filed on February 1, 1983, denying the petition for a temporary and permanent injunction pursuant to section 209(e) of the Advisers Act, 15 U.S.C. §80b-9(e) (1976); and further denying the petition for an equitable order of disgorgement of monies received in the course of the business of impersonal investment advisory publication, and further

ORDERING that an injunction issue denying defendants permission to give securities information to their subscribers or potential subscribers directly or indirectly by telephone, individual letter or in person, it is

ORDERED and ADJUDGED that judgment is hereby entered denying the petition for a temporary and permanent injunction pursuant to section 209(e) of the Advisers Act, 15 U.S.C. §80b-9(e) (1976), and it is further

ORDERED and ADJUDGED that judgment is hereby entered denying the petition for an equitable order of disgorgement of monies received in the course of the business of impersonal investment advisory publication, and it is further

ORDERED and ADJUDGED that judgment is hereby entered enjoining the defendant from giving information to their subscribers or potential subscribers directly or indirectly by telephone, individual letter, or in person.

Dated: Brooklyn, New York
February 2, 1983

Approved /s/ JACK B. WEINSTEIN

JACK B. WEINSTEIN, *Chief Judge*

/s/ RICHARD H. WEARE

Richard H. Weare
Clerk of Court

A TRUE COPY
ATTEST
Dated 2-9-1983

RICHARD H. WEARE
Clerk

By /s/ E. ORTIZ
Deputy Clerk

Trial Exhibit No. 1:

Opinion and Order of the Securities and Exchange Commission

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940

Rel. No. 759/May 11, 1981

Admin. Proc. File No. 3-5323

In the Matter of

LOWE MANAGEMENT CORPORATION
26 Broadway
New York, New York
(801-9864)

CHRIS L. LOWE

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDINGS

Grounds for Remedial Sanctions

Misappropriation of Client's Funds

Criminal Convictions

Failure to Comply with Reporting Requirements

Where registered investment adviser and its president misappropriated client's funds and failed to comply with reporting requirements, and where president had been convicted of crimes involving, among other things, misappropriation of funds, *held*, in public interest to to revoke adviser's registration, and bar president from association with any investment adviser.

APPEARANCES:

Michael E. Schoeman, of Schoeman, Marsh, Updike & Welk, for respondents.

Lawrence J. Toscano, Charles E. Padgett and *Thomas R. Hickey, Jr.*, for the Commission's Division of Enforcement.

I.

Lowe Management Corporation ("registrant"), a registered investment adviser, and Chris L. Lowe, its president and principal stockholder, appeal from the adverse decision of an administrative law judge. The law judge found that registrant, aided and abetted by Lowe, violated antifraud and reporting provisions, and that Lowe had been convicted of various crimes, including the misappropriation of funds. The law judge concluded that registrant's investment adviser registration should be revoked, and that Lowe should be barred from association with any investment adviser. Our findings are based on an independent review of the record.

II.

The law judge found that respondents misappropriated funds belonging to one of registrant's clients, a Mr. B. The relevant facts are as follows.

In the spring of 1976, Mr. B entered into an investment management agreement with registrant pursuant to which the firm was authorized to effect discretionary transactions in a brokerage account to be opened with a named broker-dealer. In accordance with Lowe's instructions, Mr. B, who wished to invest $10,000, deposited that sum with the

broker-dealer. In about August 1976, Mr. B received a statement showing a balance of about $35 in his account with no indication of what had happened to the rest of his money. Becoming suspicious, he decided to liquidate his account and requested Lowe to send him a check for the proceeds. After about two months in which he failed to receive a response, Mr. B complained to this Commission. Shortly thereafter, he received a telephone call from Lowe who said that he had been out of town and would mail Mr. B a check immediately. In late 1976, still not having received a check, Mr. B telephoned Lowe who stated that the check must have gotten lost and that he would send another. Thereafter, Mr. B received a check for about $8,800. However, it was not honored because there were insufficient funds in the account on which it was drawn. Mr. B called Lowe "over and over again" about the check, and Lowe said that "he [would] make good on it." However, although Mr. B received three more checks, none of them was honored.

Around July 1977, the New York State Attorney General's office, to which Mr. B had complained, advised Mr. B that Lowe had been arrested and had promised to make full restitution. Shortly thereafter, it sent Mr. B a check which it had obtained from Lowe. But, as before, the check was not honored. The same thing occurred with respect to a second check that Mr. B obtained from Lowe through the Attorney General's office. In February 1978, Lowe told Mr. B that he had been sent a $10,000 money order. In fact, however, the money order was only for $10.

In February or March 1978, Mr. B, who had retained an attorney, finally recovered his $10,000 less the attorney's

fee. However, the payment was only made after the institution of criminal proceedings against Lowe in New York.

In light of the foregoing, we think it clear that respondents improperly withheld Mr. B's funds, and made misstatements concerning their return.[1] Accordingly, we conclude that registrant, willfully aided and abetted by Lowe, willfully violated Sections 206(1) and 206(2) of the Investment Advisers Act.[2]

III.

The law judge found that Lowe had been convicted of various crimes. In March 1978, he pled guilty to charges that, in violation of New York law, he engaged in business as an investment adviser without filing the requisite regis-

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1. Registrant claims that there is no evidence that Lowe was acting for it. We disagree. Lowe was registrant's president and principal stockholder. Mr. B was registrant's client. And registrant issued at least two of the dishonored checks sent to Mr. B. Moreover, we have repeatedly held that the violations of a firm's employees in the course of their employment must be considered the violations of the firm. See, e.g., *Sutro Bros. & Co.*, 41 S.E.C. 443, 479 (1963); *Mississippi Valley Investment Company*, Securities Exchange Act Release No. 12683 (Aug. 2, 1976), 10 SEC Docket 168, 169. We further note that Section 203(e) of the Investment Advisers Act provides that, if we find that a person associated with an investment adviser has violated any provision of the Act, we may sanction the adviser if we find that doing so is in the public interest.

2. We find that respondents clearly had the scienter necessary to establish violations of Section 206(1). See *Steadman* v. *S.E.C.*, 603 F.2d 1126, 1134 (C.A. 5, 1979). In any event, findings of scienter are not required in order to establish violations of Section 206(2). *Id.* See also *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 200 (1963); *Aaron* v. *S.E.C.*, 446 U.S. 680, 691-693, 696-697 (1980). And all of our findings of fraud are made under the latter section. Our findings that respondents also violated Section 206(1) are merely cumulative, and the sanctions we are imposing would be the same even if we had made no findings under that provision and had made findings solely under Section 206(2).

tration application with state authorities,[3] and represented to a client that a 27% profit had been earned by managing his portfolio when, in fact, no transactions had been effected for the client and Lowe had misappropriated the client's funds.[4] In addition, in December 1978, Lowe pled guilty to charges of grand larceny. He deposited checks in a New York bank drawn on an out-of-state account that had been closed, and then issued a check drawn on the purported balance in his New York bank.

Under Sections 203(e) and (f) of the Advisers Act, each of Lowe's convictions provides a separate basis for administrative sanctions against respondents, if we find that such action is in the public interest. Respondents contend that the imposition of such sanctions would entail an unwarranted "second round of punishment." We disagree. These proceedings were not instituted to punish respondents, but to determine whether it is necessary to protect the public from further harm at their hands. As noted below, we think that such protection is required.

IV.

The law judge also found that respondents failed to comply with reporting requirements. Registrant did not promptly amend its application for investment adviser registration (Form ADV) to disclose Lowe's March 1978 convictions

3. Article 23-A, Section 359-eee of the New York General Business Law makes it unlawful for any person to act as an investment adviser in that state unless he has filed a registration statement with the appropriate state authorities.

4. Article 23-A, Section 352-c of the New York General Business Law, as here relevant, prohibits any fraudulent act or practice or any false representation where the person who made it knew the truth.

involving the misappropriation of funds and failure to register with New York authorities as an investment adviser. It was not until December 1979, after the institution of these proceedings, that registrant amended its application to disclose those convictions.

We accordingly conclude that registrant, willfully aided and abetted by Lowe, willfully violated Section 204 of the Act and Rule 204-1(b) thereunder.[4]

V.

Respondents argue that the sanctions which the administrative law judge imposed are too severe. They assert that Mr. B recovered all his funds, and that they no longer handle clients' funds or securities. Respondents state that they are now engaged solely in the business of publishing two advisory newsletters on a subscription basis, and that the publications enjoy an excellent reputation in the investment community. They point to the fact that the charges against them are unrelated to those publications.[5]

4. Respondents claim that this Commission has no statutory authority to require an investment adviser to amend its registration application. But Section 204 of the Act requires every investment adviser to "make and disseminate such reports as the Commission, by rule, may prescribe . . . ." Clearly, the amendment required by Rule 204-1(b) constitutes a "report" within the meaning of Section 204. Nothing in the Act or its legislative history supports respondents' restrictive reading of that section.

Respondents further claim that any violation was not willful. But, as we have previously held, the failure to make a required report, even though inadvertent, constitutes a willful violation. See, *e.g.*, *Haight & Company, Inc.*, 44 S.E.C. 481, 507 (1971), *aff'd*, C.A.D.C. (June 30, 1971); *Oppenheimer & Company, Inc.*, Securities Exchange Act Release No. 16817 (May 19, 1980), 20 SEC Docket 58, 59.

5. Respondents accordingly claim that the sanctions imposed by the law judge amount to a prior restraint on publication in violation of their First Amendment rights. This claim is wholly lacking in merit. See *Savage* v. *Commodity Futures Trading Commission*, 548 F.2d 192 (C.A. 7, 1977); *S.E.C.* v. *McGoff*, —— F.2d —— (C.A.

(footnote continued on next page)

Respondents' misconduct could hardly be more serious. There can be no justification for the deliberate misappropriation of a client's funds. The fact that the client was ultimately repaid does little to alleviate our concern about respondents' fitness for the advisory business,[6] particulary since restitution was made in an effort to obtain leniency in criminal proceedings then pending against Lowe. As noted above, Lowe has been convicted of crimes involving larceny, misappropriation of funds, and engaging in the advisory business without required state registration. In addition, in December 1978, he pled guilty to a charge of tampering with evidence.[7] Lowe's various actions clearly demonstrate his total lack of fitness to remain in

D.C., February 3, 1981). As the Supreme Court has stated with respect to a similar claim of undue restriction on free speech, "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *U.S.* v. *O'Brien*, 391 U.S. 367, 377 (1968). Respondents also attack the constitutionality of the Advisers Act in other respects. These claims are likewise devoid of substance. In any event, we must proceed on the assumption that our governing statutes are constitutional unless the courts declare otherwise. See, *e.g.*, *Mutual Fund Distributors, Inc.*, 41 S.E.C. 174, 181 (1962); *Stanford Investment Management, Inc.*, 43 S.E.C. 864, 874 (1968); *Milton J. Wallace*, 45 S.E.C. 694, 697 (1975).

6. See *International Research & Management Corp.*, Investment Advisers Act Release No. 617 (March 6, 1978), 14 SEC Docket 410, 414, *aff'd without opinion*, 588 F.2d 821 (C.A. 3, 1978); *Benjamin Levy Securities, Inc.*, Securities Exchange Act Release No. 14368 (January 12, 1978), 13 SEC Docket 1348, 1349.

7. In an effort to obtain leniency in the March 1978 criminal proceedings, Lowe presented to the court a photocopy of the money order he issued to Mr. B, or a receipt therefor, showing that the amount of the order was $10,000, when, as he knew, the actual amount was only $10.

"an occupation which can cause havoc unless engaged in by those with appropriate background and standards."[8]

It is well established that an investment adviser is a fiduciary whose actions must be governed by the highest standards of conduct.[9] It is apparent that respondents' actions reflect a callous disregard for those standards. Although we recognize the serious effect of the sanctions which the law judge imposed, we are convinced that lesser remedies will not suffice. We do not seek to punish respondents but, in light of their egregious misconduct, we must protect the public from future harm at their hands. In evaluating the public interest requirements in this case, we have taken into account respondents' statement that they are now solely engaged in the business of publishing advisory publications. However, respondents are still free to engage in all aspects of the advisory business. And, as the law judge noted, even their present activities afford numerous "opportunities for dishonesty and self-dealing."

Under all the circumstances, we are convinced that the public interest requires the revocation of registrant's investment adviser registration, and a bar of Lowe from association with any investment adviser.

8. See *Marketlines, Inc.* v. *S.E.C.*, 384 F.2d 264, 267 (C.A. 2, 1967), *cert. denied*, 390 U.S. 947. We further note, as the law judge pointed out, that respondents' failure to amend registrant's application for registration until these proceedings were instituted demonstrates "an indifference to important regulatory requirements."

9. See *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-192 (1963); *Rosenfeld* v. *Black*, 445 F.2d 1337, 1342-1344 (C.A. 2, 1971); *Joseph P. D'Angelo*, Investment Advisers Act Release No. 562 (December 16, 1976), 11 SEC Docket 1263, 1264, *aff'd without opinion*, 559 F.2d 1202 (C.A. 2, 1977).

An appropriate order will issue.[10]

By the Commission (Commissioners Loomis, Evans, Friedman and Thomas); Chairman Shad not participating.

/s/ George A. Fitzsimmons
George A. Fitzsimmons
Secretary

10. We have fully considered all of the contentions raised by respondents and our staff. Their exceptions to the initial decision are overruled or sustained to the extent they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
INVESTMENT ADVISERS ACT OF 1940
Rel. No. 759 / May 11, 1981
Admin. Proc. File No. 3-5823

In the Matter of
Lowe Management Corporation
26 Broadway
New York, New York
(801-9864)

Chris L. Lowe

On the basis of the Commission's opinion issued this day, it is

Ordered that the registration of Lowe Management Corporation as an investment adviser be, and it hereby is, revoked; and it is further

Ordered that Chris L. Lowe be, and he hereby is, barred from association with any investment adviser.

By the Commission.

/s/ George A. Fitzsimmons
George A. Fitzsimmons
Secretary

Trial Exhibit No. 6:

Judgment of Conviction and Order of Commitment

NEW JERSEY SUPERIOR COURT
UNION COUNTY
LAW DIVISION—CRIMINAL

S. B. I. No. 011411B

DATE OF ARREST 9/21/81

THE STATE OF NEW JERSEY

vs

CHRISTOPHER LOUIS LOWE

The defendant on 10/28/81 was indicted on Indictment #172, 1981 Term.

The defendant on 11/25/81 entered a plea of not guilty to the Indictment for the crime (S) of: (Please include Title, Statute and Degree)

Theft by Deception (Third Degree) N.J.S. 2C:20-4

and the defendant having on 1/14/82 RETRACTED PLEA OF NOT GUILTY AND ENTERED A PLEA OF GUILTY TO: Counts #1 & #2.

Theft by Deception (3rd Deg.)

Motion by defendant to be permitted to retract Guilty plea & enter plea of Not Guilty—DENIED.

IT IS, THEREFORE, on 2/19/82 ORDERED AND ADJUDGED that the defendant be and is sentenced.

Count #1—Commissioner of the Department of Corrections for a term of three (3) years. Defendant shall make restitution in the amount of $7,635.01 payable at the rate of $25.00 per week through the Department of Corrections and remitted to the First National Bank of New Jersey, 443 W. North Ave., Westfield, N.J. Attn: Mr. Joseph A. Davis.

Count #2—Commissioner of the Department of Corrections for a term of three (3) years to be served concurrently with sentence imposed on Count #1. Defendant shall make restitution in the amount of $19,740.75 payable at the rate of $25.00 per week through the Department of Corrections and remitted to the Central Jersey Bank & Trust Co., 177 E. Broad St., Westfield, N.J. Attn: Mae Goldweitz, Asst. Treasurer.

A penalty of $25.00 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1. —— penalty imposed on count(s) ————is $————respectively. Total fine ————. Total restitution $27,375.76. Total V.C.C.B. Penalty $50.00. Installment payments, if applicable, are due at the rate of $57.00 per week.

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS/HER SENTENCE.

STATMENT OF REASONS REQUIRED BY R.3:21-4(a) APPEARS ON THE REVERSE SIDE.

ATTORNEY FOR DEFENDANT Upon entry of Guilty Plea of conviction	Defendant to receive R.3:21-8 credit for time spent in custody
ANTHONY MARRA	From 9/21/81 to 9/29/81
ANTHONY MARRA At time of sentencing	Days credit 9

/s/ WALTER G. HALPIN
County Clerk

February 19, 1982
Date

STATEMENT OF REASONS, R.3:21-4(e)

/s/ RICHARD P. MUSCATELLO

Judge
HON. RICHARD P. MUSCATELLO, J.S.C.

STATE OF NEW JERSEY

COUNTY OF UNION

UNION COUNTY, ss.:

I, WALTER G. HALPIN, Clerk of the County of Union, aforesaid, and also Deputy Clerk of the Superior Court of Union County, Holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Judgment of conviction & order of commitment, Order denying motion for bail pending appeal

The State of New Jersey

vs.

CHRISTOPHER LOUIS LOWE

Indictment #172, 1981 Term

as the same is taken from and compared with the original filed in my office.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said Court and County, at Elizabeth, N.J. this 28th day of May, 1982

/s/ WALTER G. HALPIN
County Clerk and Deputy Clerk of the Superior Court
WALTER G. HALPIN

EDITOR'S NOTE

PAGES JA 78 thru JA 85 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

LOWE INVESTMENT & FINANCIAL LETTER

FOUNDED IN 1977 • MARKET TIMING & STOCK SELECTION FOR MAXIMUM PROFITS

VOL. V, No. 9, Friday, December 11, 1981

ENT FORECAST & STRATEGY

Current market weakness should end in a week or two, then we expect a good market advance to 920 then as high as 1000. Majority of our market indicators are favorable, however, remember that this is only an intermediate rally and not the beginning of a new bull market. Get into a 65-75% invested position as recommended in the Boardroom section. Retain 25-35% cash for additional buying later. Close out any short positions. GOLD & SILVER: Major policy change: Investors sell all gold mining shares at this time to avoid disastrous decline. Traders have been out of gold mining shares since November 1980. At $405.50 today, bullion appears ready to fall below $400 soon and test lows. Silver's weakness is likely to continue and a dip to the $4-6 area is a strong possibility.

HEALTHY MARKET ADVANCE APPROACHES

While the market's intermediate term advance is over two months old, the Dow Jones Industrial Average (DJIA) just confirmed the advance by moving to a new recovery high, the last of the major indices to do so. Despite the confirmation, and the current intermediate term strength in the market and DJIA, there is still reason to be cautious as this is an intermediate term rally, and not the beginning of a new bull market, which could be aborted at any time. Right now, SELECTIVITY is the key to playing this market.

First let's take a look at the longer-term outlook and the reasons why we don't feel it is the beginning of a new bull market. (1) Poor Tape Action among the blue chip sector, e.g., General Motors, IBM, etc., even while the market was advancing from the late September-early-October bottom. The longer-term charts of these stocks are not favorable and haven't been for some time; (2) Margin Debt has rolled over and this represents potential forced selling, thus knocking stock prices down. A snowball effect here would have a very negative impact on the market; (3) Interest Rates have come down, and we look for a further drop (probably the prime will fall as low as 12% in the next few months) but the real peak in rates is still to come, probably in 1982. This bodes poorly for the market; (4) There was no real Doom and Gloom at the September-October bottom as in 1970 and 1974. This is necessary to launch a powerful new bull market; (5) Actions of Members is poor as they continue to short heavily and haven't yet begun to accumulate stocks in accordance with previous major market bottoms; (6) The majority of world stock markets are in downtrends and this is unfavorable for our outlook.

From an intermediate and short term point of view, the outlook is much better. A great majority of market indicators are very positive now, and have been favorable since the beginning of the advance. Breadth Indicators have confirmed the advance and are in super shape at this time indicating that the advance has plenty of fuel left. Specialists Activities have greatly improved and the Specialists Short Sale Ratio flashed a favorable signal for the first time in a while. Advisory Sentiment reached a very favorable high of 57.6% bearish, and after being above 50% for 12 weeks, has now dropped off. Also important here is that the bullish percentage of advisors, which hit a three year high of 55%, has now dropped off as well. Monetary Indicators are now more positive than in a long time and the Federal Funds/Discount Rate Indicator will probably flash a buy signal in the next two weeks. If so, that could signal the beginning of a good advance. Also encourging in the monetary sector is the bond market showing signs of coming to life. The bond market should continue its improvement as interest rates decline further. Odd Lot Indicators are favorable, as well as the cash position of mutual funds at 10.9%. Wysong's Risk Exposure Ratio is in neutral territory, and this is favorable for the market. Insider Activity is also favorable. The NYSE Composite and S&P 500 Composite Averages have already regained over 50% of their previous loss. This indicates an excellent chance of their advance continuing in the future. While the DJIA has yet to regain 50% of its previous loss should it do so (it must climb above 919), would indicate that its advance has further to run as well.

For the short term, the market is currently experiencing weakness. We expect this weakness to continue for another week or two as the market consolidates some of its gains, experiences tax selling and works off its overbought condition. Breadth is also dragging. With good support at 860-870, we doubt the weakness will be severe, and a resumption of the advance should get back underway before year-end. How high will the market climb? The consensus among professionals is the 920-960 area on the DJIA and that's what we've said before too. However, there's just too much of that type of thinking going around for us and we feel very un-

Continued on page six

The LOWE INVESTMENT & FINANCIAL LETTER (ISSN 0193-9262), a financial magazine of general and regular circulation is sold by subscription or by the copy at $15.00 each and is published by Lowe Publishing Corporation. Issues are published twice-monthly and interim special issues are published whenever the situation warrants same. RESEARCH CHAIRMAN & EDITOR: Christopher L. Lowe. SUBSCRIPTIONS: Linda Lanzi. Subscription rates: Introductory trial (one time only): 3 months: $25; 3 month renewal: $65; 6 months: $110; one year: $195; two years: $330. Overseas airmail add $15.00 per year; special delivery at exact cost. This publication has been compiled from sources believed to be reliable, but we do not guarantee it as to accuracy, completeness or any other way. Nor is there any guarantee that future results will conform to those of the past. No portion of this publication may be reproduced in any way without advance written permission from the publisher.

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MARKET INDICATORS PERSPECTIVE

NYSE ADVANCE/DECLINE LINE: For the short and intermediate terms, in fine shape as this indicator has rallied above its September and October peaks to a new recovery high. Confirms the recovery high in the DJIA and the NYSE Composite Average. BULLISH.

NYSE NET NEW HIGHS/NEW LOWS: At 64 net new highs last week, has yet to flash a buy signal, however, the improvement from the late September-early October low at 698 net new lows, has confirmed the intermediate term rally.

NYSE NEW HIGHS/NEW LOWS: The 706 new lows the week of 2 October was the highest reading since March 1980 indicating a selling climax. However, it would have been much better for the intermediate term rally if the reading was much higher.

SHORT INTEREST/SHORT INTEREST RATIO: November's short interest figure rose to 78.9 million shares. This is bullish and represents future purchase demand. SHORT INTEREST RATIO rose from 1.55 to 1.70 which is MODERATELY BULLISH.

ODD LOT SHORT SALES: On the low side, moderately bearish, perhaps NEUTRAL at the outside.

NYSE MEMBERS' SHORT SALE RATIO: Latest NYSE figures have floor members accounting for 81.9% of total short sales, down from the previous week of 84.8%. This is the eighth week above 80% and is BEARISH. Four-week average is 84.5%, also BEARISH.

MEMBER'S TRADING: It appears that members are once again accumulating stock on balance, however, the two week drop was worrisome. If members continue to accumulate stocks it could signal the beginning of something big.

NYSE SPECIALISTS SHORT SALE RATIO: Latest NYSE report shows the most sophisticated floor members executing 36.5% of total short selling, which is BULLISH and is the 2nd lowest reading since the September bottom. An excellent omen for this intermediate term rally and which indicates that the rally is more powerful than thought. Four-week average is 36.4%, which is also BULLISH and is the lowest reading in some time.

INVESTORS INTELLIGENCE ADVISORY SENTIMENT: After hitting readings of over 50% for 12 straight weeks, bearish sentiment has now dropped off sharply to 41.5%. This was expected, however, what was worrisome was the huge number of bulls: 55%. But that, too, has dropped off also to 41.5%, MODERATELY BULLISH.

BELLWETHER STOCKS: In all, a sad group which supports our longer-term bearish outlook. These stocks, with the exception of Merrill Lynch, are acting very poor on the tape and this is extremely worrisome for the longer-term trend. DuPont at 40¼ is in a definite downtrend; support at 35. General Motors just hit a new 52-week low this week at 33 7/8, which not only is bearish for GM, but according to the 4-month rule, means we won't get a good market bottom for at least four months. IBM is also in a downtrend. None of these three stocks appears to be able to reverse their negative trends in the near future. The only bright spot is Merrill Lynch at 34 7/8, which is in a short-term uptrend and should do very well once the intermediate term advance gets underway with some better volume figures.

FOREIGN STOCK MARKETS: Virtually all major foreign stock markets are in downtrends which is negative for the longer-term outlook.

NYSE VOLUME: Average volume lately has been under 50 million shares. This will have to increase greatly in order to fuel a good intermediate move.

DJ INDUSTRIAL AVERAGE: Has now rallied to a new recovery high. Longer-term trend is down and therefore bearish, however, intermediate bottom was reached launching an intermediate term rally. The DJIA was lagging the overall market and didn't give a clear buy signal until the October peak was bettered on a closing basis. Resistance at 920. We look for the intermediate term rally to take the DJIA to the 920-960 area, perhaps as high as 1000.

DJ TRANSPORTATION AVERAGE: Has moved to a new recovery high which is quite favorable. May be in for a rest as the advance has been steep. Resistance at 400. BULLISH.

DJ UTILITIES AVERAGE: Benefiting from declining interest rates, the DJUA is acting very well and has moved out to a

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new recovery high. As interest rates continue their decline, the DJUA should climb upward challenging the recent high at the 119-120 area. BULLISH.

NYSE COMPOSITE AVERAGE: Test of the September lows was quite successful and was confirmed by the NYSE A/D Line. The NYSE Composite rallied off a very bullish reverse head and shoulders pattern which indicates a move to the 76-78 area. BULLISH.

S&P 500 COMPOSITE: While the intermediate term looks OK, the longer-term is not as favorable and this average is not looking at all the way we would like it to. Lagging the NYSE Composite and A/D Line which is not too favorable. For now, MODERATELY BULLISH.

ASE COMPOSITE: Has moved to a new recovery high and is above its 10 and 30 day moving averages. BULLISH for intermediate term.

NASDAQ COMPOSITE: Also favorable for the intermediate term.

MUTUAL FUNDS CASH POSITION: Up to 10.9% in October from 10.47% which is BULLISH even for the longer-term outlook.

WYSONG'S RISK EXPOSURE RATIO: After hitting a 48% BUY figure the week of 25 September, the RER is now in NORMAL/NEUTRAL territory at 58%. SELL signal will be flashed at 65%.

SCHABACKER PERFORMANCE INDICATOR: Latest figures: (11/27) 75% in equities, 25% cash.

MERRILL ANALYSIS INDICATOR: Latest figure as of 11/14 is a bullish 91.67%.

NYSE MARGIN DEBT: A very worrisome indicator for the longer-term trend. Margin debt "rolled over" and declined for the third consecutive month in October. Debt declined $110 million to $13.6 billion, lowest level in a year. Margin debt represents potential forced selling, especially once it rolls over, thus forcing stock prices down. Margin debt was at record levels earlier this year so the selling potential is greater.

MONETARY DATA: This group of indicators has turned quite favorable, the first time in quite a while. The prime rate has dropped from a peak of 20½% to 15 3-4 to 16%; federal funds rate has dropped to under 13% and the discount rate has been cut four times to 12%. This is indeed encourging and a buy signal could be given on the Federal Funds/Discount Rate Indicator in the next few weeks. Also very favorable is that free reserves have moved into positive territory. In all, very favorable for the intermediate term trend of the market. Also favorable is the fact that the bond market is showing signs of coming to life.

DJ 20 BOND AVERAGE: A buy signal was given at 57.20, resistance at 61-62 area, longer-term trend still bearish.

INSIDERS: Insiders have been buyers on balance for many weeks now and this is BULLISH for the intermediate term trend of this market.

DJIA P/E & YIELD: DJIA P/E at a BULLISH 7.2; yield also BULLISH at 6.21%

Precious Metals Corner/continued from page eight

we advised the purchase of several silver mining stocks, which racked up huge gains. In March 1980, we placed a stoploss of $30 on silver bullion for traders which was tripped that month and which stoploss has saved traders and investors alike a considerable sum. Our next signal was a trading buy signal in June, 1980 at $16, followed by a trading sell signal in October, 1980 at $20. (silver bullion having rallied as high as $24.25 in September, 1980).

Currently, with silver down to $8, due mainly to the recent silver auctions by the government, we do think there is a great possibility of a further drop, perhaps to as low as $4-6. While traders are out of silver at this time, we must urge investors to re-evaluate their positions in silver bullion and silver mining shares, as they too will be subject to a severe decline over the next three to six months. However, the demand for silver over the decade will continue to be greater than the supply and a target of $100 an ounce is not unrealistic by 1986, the next top according to the six year cycle. We will have our silver chart updated by our next issue and review the silver strategy in more detail then. For now, get out and stay on the sidelines.

Continued on page six

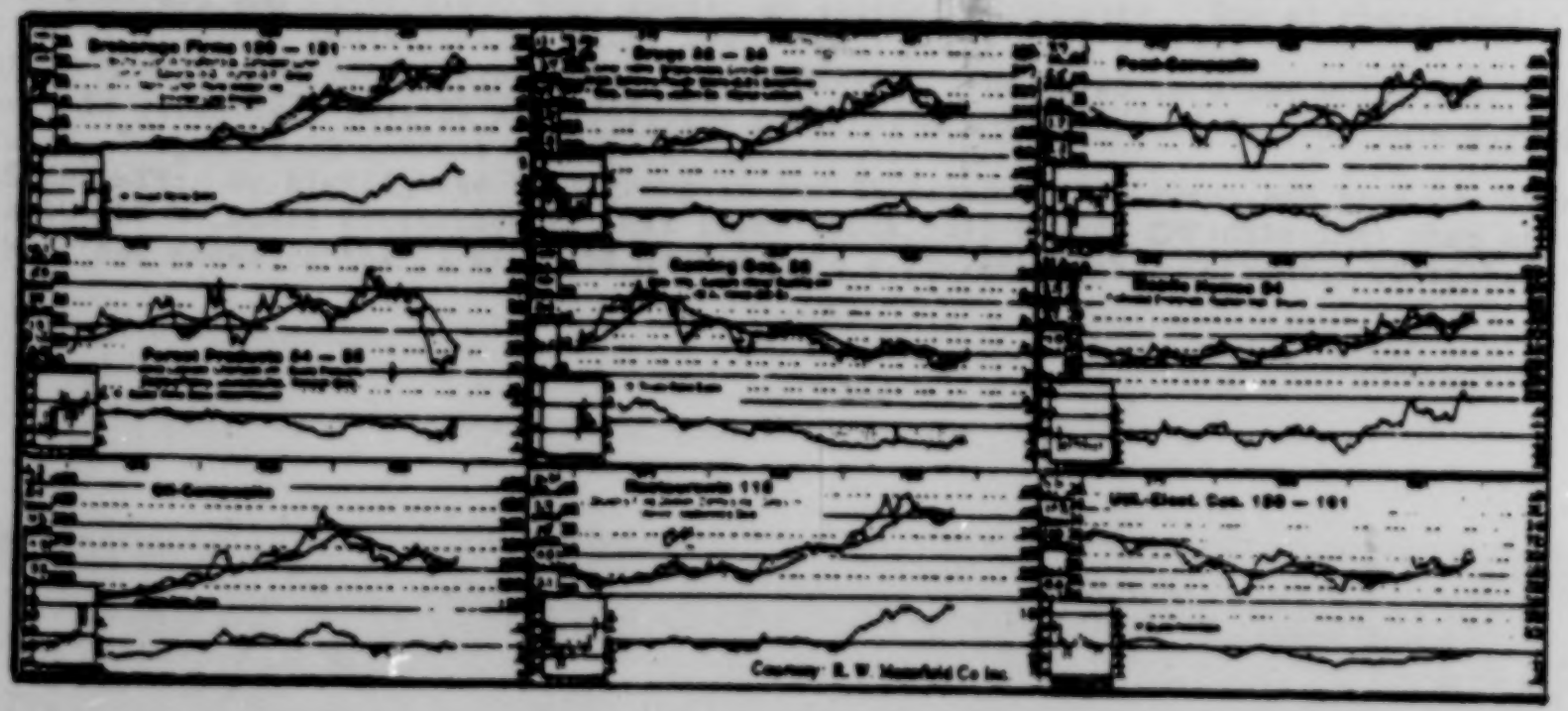
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December 11, 1981

LIFL BOARDROOM

Despite the market's intermediate term strength, the key to market profits is SELECTIVITY. This is perhaps the most important thing to keep in mind at this time, especially since we view this rally as an intermediate term advance (bear market rally) which could be aborted at any time. Therefore, with that in mind, let us look at the most favorable areas. The most favorable groups at this time are: BROKERAGE FIRMS, DRUGS, FOOD-RELATED, FOREST PRODUCTS, GAMING, MOBILE HOMES, RESTAURANTS, OIL-RELATED and UTILITIES.



Groups to AVOID now (or SELL) are: AEROSPACE, AIR TRANSPORT, COPPER, COSMETICS, ELECTRONICS-TECHNOLOGY, GOLD MINING, HOSPITAL MANAGEMENT, OFFICE EQUIPMENT, AUTO MANFACTURERS, TEXTILES, and TRUCKERS.

The most attractive stocks for purchase within these favorable groups and the stocks we recommend for purchase now are:

BROKERAGE FIRMS: Donaldson, Lufkin, Jenrette (DLJ-NYSE-15). Already on our recommended list at 9½, recommended on 26 November 1980, DLJ just broke out on the upside to a new high at 15. Currently at 15, DLJ provides a great way to participate in a group that 1) is poised for a healthy move; 2) will enjoy a good rise during the market's intermediate term rally. DLJ is a good low-priced issue in this group. (A. G. Edwards also looks good.) Stop: 11 7-8.

DRUGS: Marion Labs (MKC-NYSE-26¼). Just broke out above 26 resistance area to a new multi-year high. While P/E is a high 28.2, the stock is showing good tape action, good relative strength and insiders have been accumulating this stock. Buy in 26-28 area with an intermediate target of 35-40. Stop: 20¼.

FOOD-RELATED: Several stocks in this group look attractive now. American Bakeries (ABA-NYSE-13 5/8) is coming off a bottom in the 10-12 area and has just broken out above the important 12 resistance area. Buy in 12-14 area for an initial target of 16-18. Stop 10½. Consolidated Foods (CFD-NYSE-33½). On the verge of breaking out above resistance at 34. Relative strength is good. Stop: 26½. Yield is 6.5%; P/E a modest 6.8. Keystone Foods (KFC-NYSE-15 5/8). On the verge of a break out above the heavy resistance at 16, which would put this stock at an all-time high. Relative strength is good. Buy

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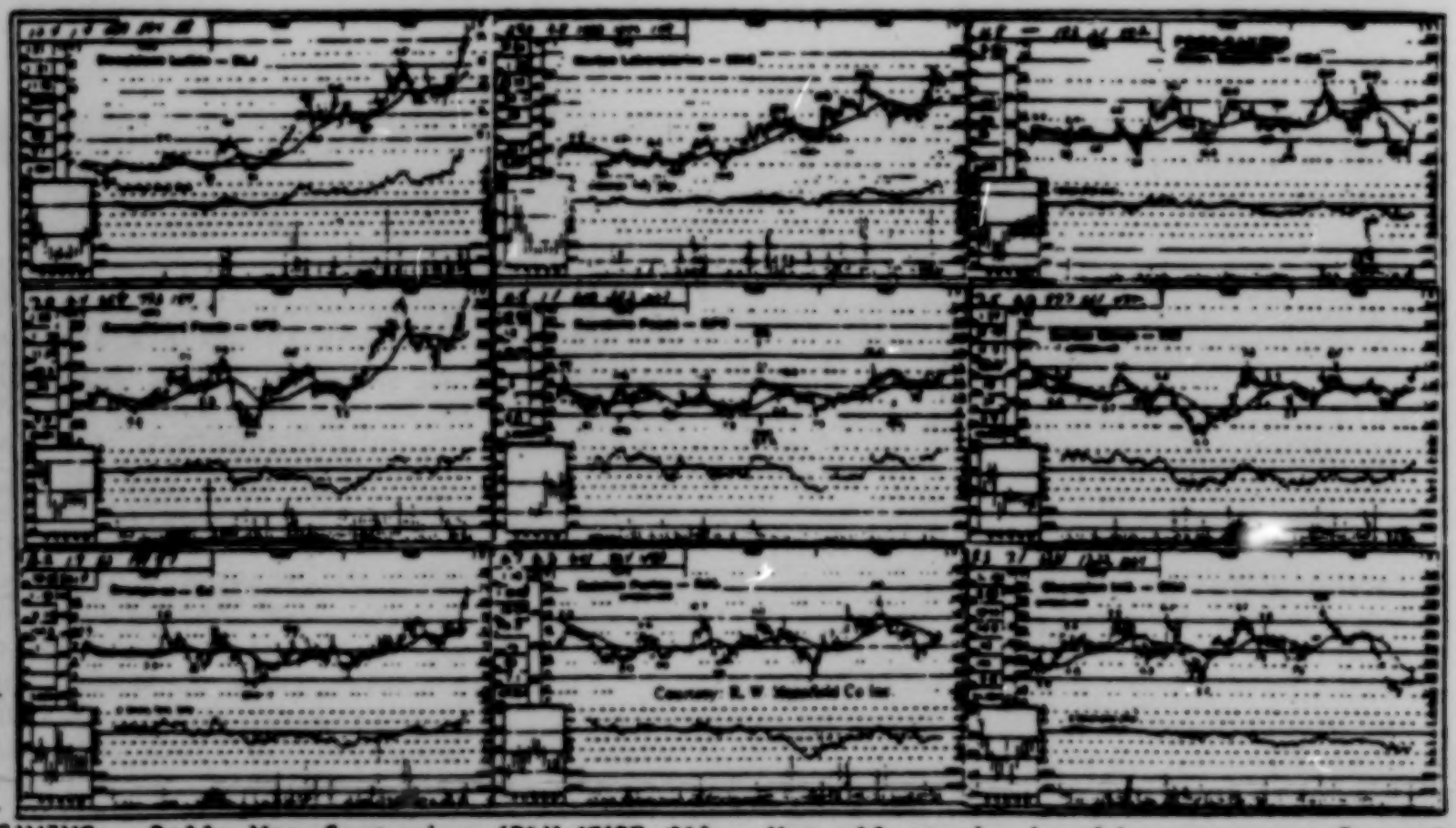
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December 11, 1981

Boardroom--Continued from previous page

in 16 area. Stop: 12¼. Yield: 1.1%. Norton Simon (NSI-NYSE-17-1/8). Appears ready to breakout above the heavy resistance zone at 18. Good yield at 6.8%, buy especially on breakout above 18 or at current levels OK too. Stop: 13-7/8. Orange Co. (OJ-NYSE-10) Just moved to a multi-year high, breaking out above resistance in the 9 area. Appears poised to move to the 15-17 area at a minimum; excellent relative strength. Stop: 8¼. Ralston Purina (RAL-NYSE-11-3/4). Has rallied off support at the 10 area and appears ready to challenge the high made earlier this year. Buy in the 11-12 range, stop: 9¼. Increasing relative strength a plus.

FOREST PRODUCTS: Champion Intl (CHA-NYSE-21¼)? Coming off a bottom in the 18-20 area, CHA appears ready to regain some of its recent lost ground. Resistance at 24 area, however, increasing relative strength should help overcome this barrier. First target is 24, then a breakout above 28. Options available. Stop: 17 3/4. Georgia-Pacific (GP-NYSE-22). Same type pattern as CHA, however, there is resistance at 22 area. We believe a breakout above 22 would indicate a move toward 30 once again, especially on increasing relative strength. Stop: 18. Options also available. Louisiana-Pacific (LPX-NYSE-20). The more speculative of the group, and a breakout above 20-21 would turn LPX favorable. P/E is a high 18 and yield only 4.2%. Initial target: 26, then 28-30.



GAMING: Bally Manufacturing (BLY-NYSE-31). Not all stocks in this group are favorable, in fact only one at this time and that's Bally. BLY just made a powerful breakout above the heavy resistance area at 30, and we look for the move to be a powerful one. Initial target 40-45. This play is twofold: the gambling side (casinos and gambling equipment manufacturer) and video/electronic games, an explosive industry. Buy at these levels. Relative strength looks great. Stop: 24½. Don't forget the options.

MOBILE HOMES: Fleetwood Enterprises (FLE-NYSE-14). FLE moved to a new multi-year high above 14 recently. This is a speculative play, with a high P/E of 31, but in a strong group. Target 18-20. Place a stop at 11½.

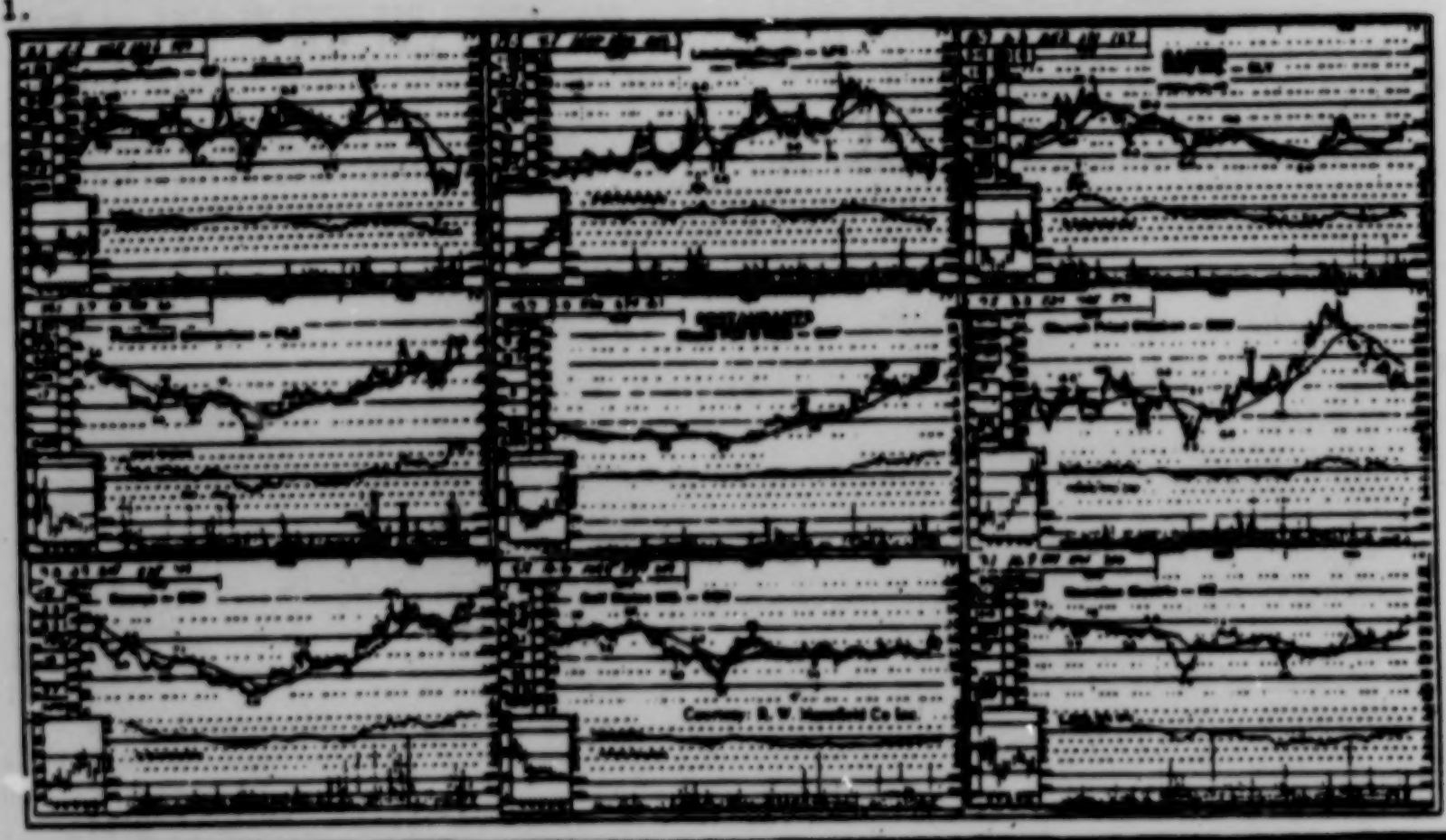
RESTAURANTS: We highlighted this group in our 31 January 1981 issue and gave you three stocks which looked attractive at that time: Chock Full O Nuts CHF-NYSE-13½) then at 6-3/4, has moved to the 13 area and brokeout to a 10-year high. Currently it looks

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Boardroom--Continued

attractive yielding 3.1%. Stop: 10¼. Church's Fried Chicken (CHU-NYSE-25 3/4), then 27 5/8, rallied to a high of 37 3/8, but has since backed-off. We would avoid this issue at this time as it has topped-out, has poor relative strength and is below its moving average. Dennys (DEN-NYSE-30 3/8). Then at 21 5/8, DEN moved to 31 3/4 this past summer and now at 30 3/8 appears ready to challenge the high and move to higher ground. Good relative strength. Buy in the 30-31 area for a first target of 35. Stop: 25.
UTILITIES: With the decline of interest rates, some utility stocks offer excellent gain potential and yield (total return). One such is Gulf States Utilities (GSU-NYSE-12). Yield is a nice 12.2%, P/E only 6 and insiders are accumulating stock. Breakout above 13¼ would be a big plus and would signal a move toward the 17-20 area. Also attractive is Hawaiian Electric (HE-NYSE-26). HE just brokeout above heavy resistance at 26; a move above 27 would make this stock most attractive. Yield is nice 11%, P/E 7.1.



Precious Metals Corner/continued from page three

WHAT TO DO NOW: TRADERS: Have been out of gold mining shares since the last week of November 1980; stay on the sidelines as previously advised. INVESTORS: Sell all gold shares at this time as we foresee a disastrous further decline in all gold mining shares over the next three to six months. Silver-related investments should also be scaled back, the shares sold by traders and investors alike, and to prepare for the accumulation of silver bullion once a bottom has been reached.

Market Summary/Continued from page one

comfortable with that forecast. We are now leaning toward the view that the DJIA will move toward the 920 area and then explode above that moving as high as 1000. Should the market fail before 920 is reached, that will be the signal that the advance is over, and is one of our primary reasons for remaining cautious at this time.

Therefore, our strategy is to get into a 65-75% invested position in the strongest stocks (see the Boardroom section for our recommendations), buying them at current levels, or better yet, on reactions. Continue with 25-35% in cash, but be ready to commit additional funds to equities as this market shows additional strength. Once the current weakness is over, we think we'll see a very healthy advance, perhaps like January 1976. Switch fund traders should be 100% invested in aggressive funds at this time.

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December 1[illegible], 1981

PRECIOUS METALS CORNER

GOLD AND SILVER REVIEW

To bring our many new subscribers up to date, in our issue 26 November 1980 we advised subscribers: "...we are not advising the sale of gold bullion at this juncture. But, if gold fails to move above $645, or it clears $645 and fails at $660, we would say the chances of seeing $690 or a challenge of $720-850 in the future would not be very likely, and a drop to $560-570 or lower would be in the cards. For now, we are neutral to moderately bullish (on the intermediate term), but a move above $660 and $690 would change that. Before our next issue, if gold fails at one of these critical points ($660 or $690) we would close out positions at once."

Gold bullion did fail to better the high at $637.75 shortly thereafter and a trading sell signal was automatically flashed in accordance with our previous advice. Ever since then, we've advised subscribers to look for lower prices for the metal accompanied by bear market rallies.

Let's look at the longer-term outlook for gold bullion. This trend is down and has been since the top in January 1980 at $850. There have been bear market rallies but currently at $416.75 gold has lost about 51.5%. The U.S. inflation rate is declining and we don't look for any reversal of gold bullion for some time. In fact, the Consumer Price Index/Gold Bullion Indicator has just flashed a sell signal. However, we look for gold's bear market bottom within the first half of 1982, in the $250-320 range. Gold bullion's price moves within a six year cycle, with tops and bottoms coming six years apart (as does silver bullion). Bottoms have occurred in 1970 at $35, 1976 at $103.50, and the next bottom we're estimating in 1982 at $250-320. Tops have occurred in 1968 at $44, 1974 at $197.50, and 1980 at $850.

From the bottom in 1970 to the top in 1974, gold's price rose 466%, and from the bottom in 1976 to the top in 1980, rose 721%. From the ton in 1968 to the top in 1974, gold's price rose 350%, and from the 1974 top to the 1980 top, the increase was 329%. Using the average increase from bottom to top (593%), from the 1982 estimated bottom at $250-320 projects a top for 1986 at $1732-2218. Taking the average from top to top, (1968-74-80: 339.5%) projects the next top at $3738.

Likewise, from the 1970 bottom to the 1976 bottom, gold's price increased 196%. Projecting this out, the 1982 bottom would be $307, within our estimated $250-320 range. Of course, the wide parameters of $1732-3738 as a 1986 top is a wide spread, but it does give us some kind of an idea of the magnitude of gold's next bull market. While projecting out the future gold price in this manner might be simplistic, gold's price cycle has remained constant, and our longer-term gold charts show major support in the $250-320 area. Personally, we look for a top in the $2500 area. We believe there will be increased inflation, worldwide economic havoc, and greatly increased worldwide political turmoil;and in fact, even a world war or major war somewhere, (cycles also project a major war in 1983-86) which will be fuel in gold's price rise. With at least this much in mind, we can turn to the present and prepare for gold's bottom in order to take advantage of the opportunity just like in 1970 and 1976.

Turning to the intermediate and short terms outlook, gold first fell below $400 in July and then again in August. From a bottom at $391.25 in August, gold rallied to $463.50 in September and once again declined to $391 thus tracing out a head and shoulders top formation. A drop below $391.25 would break the neckline and would therefore project a low in the $360 area. However, gold's decline has been swift from $463.50 and a rally back to the $421 area (as we just experienced this past week) was in the cards, but a move above $450 is unlikely indeed. For now, only the very quick and nimble traders should trade gold,

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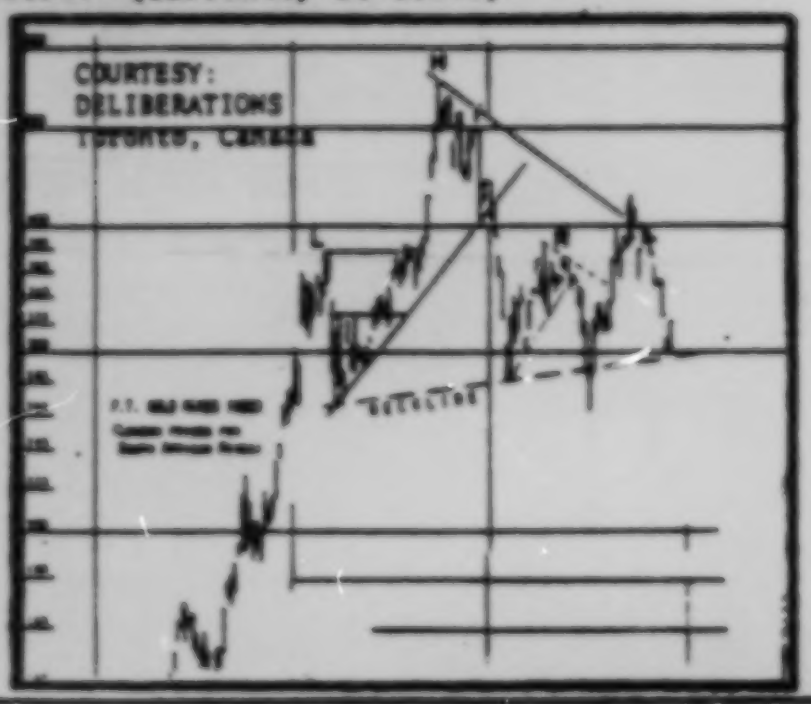
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while most should just continue to sit on the sidelines until a bottom is reached.

GOLD MINING SHARES

MAJOR POLICY CHANGE: INVESTORS SELL ALL GOLD MINING SHARES

Again, for the benefit of our many new subscribers, in the early part of 1980 we advised subscribers that gold mining shares would outperform the metal. We advised the retention of gold mining shares, and indeed they did outperform the metal 1980 and most of 1981. In our issue of 26 November 1980, we advised the outright sale of gold shares for TRADERS as our research at that time showed that gold shares were in a top area. That proved most timely advice as all gold mining shares, domestic, North American and South African have collapsed since then. We advised long-term INVESTORS to hold their South African shares because the huge yields would act as a cushion on the downside, but strongly advised the sale of the domestic and North American shares, and a re-evaluation of long-term investors South African share portfolios. However, we are now making a major policy change and advise all investors and traders to SELL all gold mining shares, South African, domestic and North American. The reason for this action at this juncture is clear on the chart of the FT Gold Mining Index below: (Currently at 330.8)



The large head and shoulders top formation traced out in 1980 (left shoulder and head) and 1981 (right shoulder) is loud and clear: be prepared for a very nasty drop in gold mining share prices. In addition, another smaller head and shoulders formation has occurred over the past four months. Once the neckline is broken, a minimum decline to the 200 area on the chart is expected. We do not want you to experience this decline and bloodbath, in what could cost gold shares anywhere from 50-75% of their current price value. It would be better to sell out long-term insurance positions and pay the capital gains taxes than to go through a disastrous decline as the chart indicates. The decline could be even more severe (to the 160 area on the chart) so you can see our reasoning for the policy change at this time. Traders have been out since the last week in November 1980, and have avoided severe damage since then, now it's time for investors to sell and sit on the sidelines as well.

To sum up, there may be a period of strength in the shares over the next week or so which you can use to get out, however, we want you to plan on selling out all positions in gold shares in the very near future. This advice also applies to gold mutual funds, which funds should be switched to a money market fund or equity fund.

In the next few issues, we shall examine all gold shares in more detail as well as set up a few model portfolios for various amounts and review gold mutual funds and other gold-related investments so we'll be amply prepared to act when the time is right. That time will be at hand when no one wants gold-related investments, as at previous bottoms in 1970 and 1976.

SILVER

In 1976 and throughout 1977, we advocated a buying program for silver bullion in the $4-6 range. In December 1978 we said: "Silver is now on the springboard to all-time highs." In August 1979, just before silver exploded above the $10 mark, we said: "buy silver with both hands." In addition, in January and throughout 1978,

Continued on page three

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IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

R. Bruce Rich
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorney for Amicus Curiae
Association of American Publishers, Inc.

Lauren W. Field
Weil, Gotshal & Manges
Of Counsel

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No. 83-1911

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Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE*

Preliminary Statement

The Association of American Publishers, Inc. submits this brief, *amicus curiae,* pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioners Christopher L. Lowe, Lowe Publishing Corporation, Lowe Management Corporation and Lowe Stock Chart Service, Inc. The written consents of the parties to the filing of this brief have been obtained and are being filed with the clerk of this Court.

Interest of the *Amicus*

The Association of American Publishers, Inc. ("AAP"), a not-for-profit trade association organized under the laws of the State of New York, is the major trade association for book publishers in the United States. AAP's more than 300 members include most of the nation's leading commercial book publishers and many smaller and non-profit publishers, including university presses and scholarly associations. Among the myriad publications of AAP's members are many non-fiction works concerned with economic and financial topics, including books devoted to the securities markets and other forms of investment. Set forth in the Appendix hereto is a random sampling of such works from several of AAP's members. Were this Court to accept the sweeping registration and licensing authority over publications here claimed by Respondent Securities and Exchange Commission (the "SEC") and sustained below by the court of appeals, many of these, as well as scores of other similar works, could conceivably be swept within the SEC's regulatory grasp, subjecting their publishers to registration and licensing requirements as a condition of publication.

AAP's members are deeply concerned over the prospect of such potentially far-reaching regulation and for its consequences upon the First Amendment freedoms which they enjoy. Accordingly, the *amicus* urges through this brief that the Investment Advisers Act of 1940—the statutory authority upon which the SEC bases its bold censorial power—be construed so as to deprive the SEC of licensing authority over publications of financial fact and opinion

such as those of Petitioner Lowe. The AAP also respectfully urges that, in reaching this result, the Court reaffirm the constitutional distaste for prior restraints on expression of the type here invoked by the SEC, as well as reject the SEC's effort to expand dramatically the scope of the commercial speech doctrine.

Statement of the Case

A. Background

Petitioner Christopher L. Lowe ("Lowe") is the president of the three corporate entities which join him in this appeal: Lowe Management Corporation, Lowe Publishing Corporation, and Lowe Stock Chart Service, Inc. (herein collectively "Petitioners"). Since 1974, Lowe has periodically published investment newsletters containing information relating to various investment markets. The information so provided consists of factual data pertaining to movements in those markets as well as short- and long-range forecasts. Based upon both general market data and publicly available factual information as to specific publicly-traded securities, the newsletters also contain assessments as to the desirability of investing in any of the markets or securities reported on. The newsletters are distributed by mail to subscribers who pay a fee to receive them.

On May 11, 1981, the SEC revoked the previously granted Investment Adviser registration of Lowe Management Corporation, and barred Lowe from further association with any investment adviser. This SEC action, taken pursuant to sections 203(e) and (f) of the Investment

Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21, 80b-3(e), (f) ("Investment Advisers Act"), was based upon Lowe's prior convictions on felony and misdemeanor counts in 1977 and 1978. Though Petitioners had been engaged in the publication of investment newsletters since 1974, neither the prior convictions nor the revocation of registration was based upon any misconduct in connection with those publishing activities. After Lowe Management Corporation's Investment Adviser registration was revoked, Lowe discontinued handling funds and securities on behalf of clients and concentrated solely on publication of the newsletters. Significantly, no claim is made in the instant action that Petitioners have published any false or misleading information in their newsletters or have profited through personal or corporate investments from any advice rendered therein. *SEC* v. *Lowe*, 725 F.2d 892, 895 (2d Cir. 1984).

B. Lower Court Decisions

In June of 1982, the SEC filed a four-count complaint against Petitioners in the United States District Court for the Eastern District of New York. Based upon the fact that Petitioners were not registered under the Investment Advisers Act, the SEC sought, *inter alia*, an order enjoining further publication of their newsletters. The district court, per Chief Judge Weinstein, denied an injunction against Petitioners' publishing activities, holding that the First Amendment did not permit a construction of the Investment Advisers Act which would give the SEC the power to prohibit publication of impersonal investment newsletters. While the district court doubted that the SEC was correct in maintaining that the newsletters in question

constituted commercial speech, it held injunctive relief would in any event be inappropriate as such relief was more extensive than necessary to serve the asserted governmental interest. The district court did, however, issue an injunction prohibiting Petitioners from offering securities information to subscribers by telephone, individual letter or in person. *SEC* v. *Lowe*, 556 F. Supp. 1359 (E.D. N.Y. 1983).

The United States Court of Appeals for the Second Circuit, in a two-to-one ruling, reversed the denial of an injunction against future publication of Petitioners' newsletters. Authorizing the grant of injunctive relief sought by the SEC, Judges Oakes and Van Graafeiland held that whether the case was treated as one involving the permissible regulation of economic activity or as one involving commercial speech, a revocation of registration resulting in a bar to further publication of Petitioners' newsletters did not violate the First Amendment. District Judge Brieant, sitting by designation, dissented on the basis that First Amendment principles required affirmance of the judgment below. *SEC* v. *Lowe*, 725 F.2d 892 (2d Cir. 1984).

Summary of Argument

The injunction authorized by the court of appeals constitutes a classic prior restraint on speech in violation of the First Amendment. The SEC's effort to justify such prior restraint on the grounds that merely commercial speech is at issue is inappropriate in that publications such as those of Petitioners are entitled to the full protections of the First Amendment against suppression absent a showing of imminent harm. Even were the commercial speech

doctrine applicable, the SEC's theory of suppression—that a prior restraint on Petitioners' publishing activities is warranted based on prior, unrelated misconduct—is equally constitutionally impermissible.

Given the potentially untoward application to publishers of financial news and opinion of the SEC's interpretation of the Investment Advisers Act, the Act, to be constitutional, must be sensitively construed to ensure that the threat of similar restraints on other disinterested publishers may be avoided.

ARGUMENT

I. The expression sought to be regulated by the SEC is entitled to full First Amendment protection and should not be relegated to the status of commercial speech.

Central to the disposition of the case below was the determination by the court of appeals majority that Petitioners' publishing activities constitute commercial speech deserving of lesser constitutional protection than other "forms of social, political or religious expression." *SEC* v. *Lowe,* 725 F.2d at 899 (quoting *SEC* v. *Wall Street Transcript Corp.,* 422 F.2d 1371, 1379 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970)). Having so concluded, the appeals court did not confront the SEC's actions as classic prior restraints on expression to be tested under the First Amendment's stringent standards. It instead looked to this Court's commercial speech cases as a basis for justifying the SEC's actions.[1]

1. As we discuss in Point II(B) below, the appeals court erred as well in determining that those precedents, to the extent applicable, permit the injunctive relief afforded the SEC here.

As we discuss below, the majority below was able to categorize Petitioners' publishing activities as commercial speech only through a strained interpretation of this Court's guiding precedents; indeed, an affirmance of that view—relegating "a journal of fact and opinion to paid subscribers," 725 F.2d at 904 (Brieant, J., dissenting), to the category of commercial speech—would have far-reaching and adverse implications for the constitutional status and vitality of countless other publications.

Beginning with *Bigelow* v. *Virginia,* 421 U.S. 809 (1975), this Court has developed a body of law defining the extent of First Amendment protections to be afforded so-called "commercial speech." The cases make clear that commercial speech invariably entails expression which promotes a product or service on behalf of speakers having a direct financial interest in the particular product or service. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976) (prohibition on advertising of prescription drug prices violates the First Amendment rights of pharmacists who sell such drugs and consumers who wish to purchase them); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977) (blanket ban on the advertising by lawyers of the availability and terms of routine legal services violates the First Amendment rights of lawyers); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980) (total ban on advertisements which promote electric services violates the First Amendment rights of an electric utility); *Bolger* v. *Youngs Drug Products Corp.,* —— U.S. ——, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983) (absolute prohibition on use of the mails for unsolicited advertisements promoting the use of prophy-

lactics violates the First Amendment rights of manufacturer, seller and distributor of contraceptives).

In no instance of which *amicus* is aware has the commercial speech label attached to discussions of lawful products or services on the part of speakers having no pecuniary interest in the subject matter. Were it otherwise, *The New York Times'* restaurant reviews, *Consumer Reports'* product evaluations, and *Esquire's* men's fashion reports, to name just a few, would subject such publications to the more limited protections of the commercial speech doctrine. This Court surely has not intended such a sweeping expansion of the commercial speech doctrine.

If this be the case, then the mere fact "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is [fully] safeguarded by the First Amendment." *Time, Inc.* v. *Hill,* 385 U.S. 374, 397 (1967) (quoting *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-502 (1952)). *Accord Pittsburgh Press Co.* v. *Pittsburgh Commisison on Human Relations,* 413 U.S. 376, 385 (1973); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964); *Smith* v. *California,* 361 U.S. 147, 150 (1959).

The foregoing principles have been plainly disregarded by the SEC and by the court below in their application to Petitioners' publishing activities. It is not contended by the SEC that Lowe has sought to profit from the specific investments or investment strategies discussed in his newsletters; his financial interest lies in the sale of the newsletters themselves. That being the case, it is inappropriate constitutionally to lump together Petitioners' newsletters

with classically commercial advertisements or promotional brochures aimed at promoting sales for the advertiser. Rather, Petitioners deserve to stand on the same constitutional footing as any other publisher who discusses the merits and demerits of products and services—financial and otherwise—as a service to its readers or subscribers.

Apart from the fact that Petitioners have not promoted a commercial transaction to their own benefit, the very content of the publications involved belies any suggestion that they are deserving of anything less than the full protection of the First Amendment. The newsletters' analyses thus go well beyond "buy" and "sell" recommendations with respect to specific securities. They also contain views and opinions on topical issues for investors and potential investors, analyses of current market conditions, and other relevant factual material of interest to subscribers to financial publications. In this regard, the speech here challenged by the SEC is of the same kind as is routinely found in magazines, newspapers and books (*see, e.g.,* the Appendix hereto) devoted to a broad range of financial and investment topics. Such expression is radically different from that presented in the commercial speech cases;[2] it is the essence of news reporting, analysis and opinion, to which the public is entitled to unrestrained access.

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2. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761 (1976), in contrast, a factor warranting commercial speech treatment was that the advertiser "does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any newsworthy fact, or to make generalized observations even about commercial matters."

Additional support for the notion that the expression in Lowe's newsletters is not of the kind properly termed commercial speech is

(footnote continued on next page)

Viewed in the context of this Court's prior decisions, the SEC's contention that Lowe's newsletters should be regarded as commercial speech since they offer advice "on the relative merits of various investments and as such merely recommend commercial transactions," *SEC Opposition Brief to Petition for Certiorari ("SEC Opposition Brief")* at 11-12, is clearly incorrect. It is precisely such "advice" and "mere recommendation" which, when provided by a disinterested third party, are sought to be fostered, and are fully protected, by the First Amendment.

II. The injunction prohibiting Petitioners from publishing their newsletters constitutes an impermissible prior restraint on publication.

A. The stringent standards governing issuance of a prior restraint have not been met in this case

This Court has properly admonished that "prior restraints on speech and publication are the most serious

found in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 564 n.6 (1980) (citations omitted), where the Court observed:

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation'.

Accord Bates v. *State Bar of Arizona,* 433 U.S. 350, 381 (1977). Petitioners' publication of their newsletters can be seen to possess neither feature. Petitioners are not speaking about their own products or services and so cannot be presumed to have intimate knowledge concerning them. Further, the facts and opinions in their newsletters are most certainly not the kind of "hardy breed of expression" resistant to overbroad regulation to which this Court was referring—lest all commentary on financial and other matters with commercial ramifications were to be so classified.

and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 559 (1976). This bedrock constitutional principle has resulted in the imposition of an extraordinary burden on those who would seek to impose such a restraint. Indeed, claims that the very security of this nation would be threatened by publication have been rejected as insufficient to warrant a prior restraint, absent compelling evidence: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient. . . ." *New York Times Co.* v. *United States,* 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

In the face of these demanding constitutional requirements, no showing of any kind was made in the courts below which suggests, let alone establishes, that the continued publication of Petitioners' newsletters would result in anything "kindred to imperiling the safety of a transport already at sea." Indeed, as the SEC has never contended that Petitioners' previously published newsletters contained false and misleading information, it is not surprising that the SEC has nowhere alleged that publication of the newsletters has already caused, or is likely or certain to cause, harm to their subscribers. Instead, the SEC seeks, and the majority below was willing, to suppress Petitioners' newsletters on the basis of prior misconduct *unrelated to Petitioners' publishing activities*—misconduct which, it is claimed, forms a sufficient basis on which to find a potentiality for false and deceptive speech. As

"[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963), *amicus* submits that the SEC's flimsy rationale utterly fails to satisfy its extraordinary burden of proving imminent harm.

There is, moreover, specific precedent which forbids that which the SEC has sought to do here: enjoin future expression on the basis of unprotected past conduct. In *Vance* v. *Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), this Court affirmed a decision holding unconstitutional a statutory scheme regulating nuisances which authorized a prior restraint against a theatre's exhibition of motion pictures not yet finally adjudicated to be obscene, on the basis of a showing that obscene films had been exhibited in the theatre in the past. The facts of *Vance*, involving prior misconduct related to the activity sought to be enjoined, make the instant case, involving prior misconduct unrelated to Lowe's publishing activities, *a fortiori*.

Seeking to avoid application of clearly controlling First Amendment principles, the SEC analogizes the prohibition imposed on Petitioners' publishing activities to the restrictions imposed upon professionals who are barred from practicing in their fields as a result of misconduct. But such effort at analogy fails, since the SEC's action directed against Petitioners' newsletters (as opposed to Lowe's other investment adviser activities) operates as a prior restraint on speech. The sanctions imposed upon Lowe thus go much further than the revocation of a professional license; they not only prevent Lowe from engaging in the professional activities of an investment adviser, but also

completely and effectively prohibit him from espousing his views on financial matters in any publication in which he or his companies have an interest. As was cogently stated by Judge Brieant in dissent:

> The expression of opinion by [Lowe's newsletters] is poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.* "Prevention Magazine") is from the practice of medicine, or a book advising how to avoid probate is remote from the practice of law. The latter require a medical or law degree and a license, while the former are protected First Amendment expression. *See New York County Lawyers Association* v. *Dacey*, 21 N.Y. 2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 *rev'g*, 28 A.D.2d 161, 283 N.Y.S.2d 984 (1967).

SEC v. *Lowe*, 725 F.2d at 903.

In the guise of seeking to regulate a profession, the SEC is instead suppressing speech. In reasoning with clear application here, this Court, in its landmark decision in *Near* v. *Minnesota*, 283 U.S. 697, 720 (1931), struck down a similar end-run of the First Amendment: "In attempted justification of the statute, it is said that it deals not with publication *per se* but with the 'business' of publishing defamation. . . . Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."

Amicus submits that the SEC's bootstrap operation—maintaining that the publishing of newsletters, in and of itself, constitutes the rendering of investment advice, thereby subjecting the publisher to the registration and licensing requirements for investment advisers under the Invest-

ment Advisers Act—is constitutionally inappropriate. The injunction authorized in this case constitutes a classic prior restraint and, as such, should be stricken.

B. Even were Petitioners' expression properly classified as commercial speech, a prior restraint on these facts would not be warranted

While the *amicus* firmly believes that Petitioners' publications are entitled to the full protections of the First Amendment (*see* Point I, *supra*), even if the newsletters are properly viewed as commercial speech and therefore subject to a somewhat more limited form of protection, the complete prohibition on publication authorized by the majority below would still violate Petitioners' First Amendment rights. This conclusion follows most directly from this Court's recognition, in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 n.9 (1980), that: "[I]n recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."

In Central Hudson, the Court set forth a four-part analysis to be used in judging restrictions imposed on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted,

> and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. In the instant case, it is not disputed that Petitioners' speech concerns lawful activity, and no claim is made that the expression contained in their already published newsletters has been false or misleading.

Rather, the SEC maintains, and the majority below agreed, that Petitioners' publications are "potentially deceptive" because of Lowe's "questionable honesty and integrity." *SEC Opposition Brief* at 12 n.17. It is claimed that since only commercial speech is in issue, Petitioners' publications may be regulated, *i.e.,* permanently banned, based solely on such possibility of future deception. *SEC* v. *Lowe,* 725 F.2d at 901.

The SEC relies on this Court's decision in *Friedman* v. *Rogers,* 440 U.S. 1 (1979), as support for its regulatory rationale. But *Friedman* involved a prohibition on the use of a trade name, a form of expression which, it was emphasized, contains no intrinsic information. 440 U.S. at 12-13. Moreover, this Court made plain in *Friedman* that

> the information associated with a trade name is largely factual, concerning the kind and price of the services offered for sale. Since the [Texas Optometry] Act does not prohibit or limit the type of informational advertising held to be protected in *Virginia Pharmacy* and *Bates,* the factual information associated with trade names may be communicated freely and explicitly to the public. . . . Rather than stifling commercial speech, [the Act] ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past

> when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name.

Id. at 16. Here, by contrast, the free flow of information is exactly what has been prohibited. As acceptance of the SEC's interpretation of the Investment Advisers Act would completely silence speech rather than provide for a more accurate and complete dialogue, the alleged-potential-for-deception rationale of the SEC simply cannot be said to satisfy the clear requirement of *Central Hudson* that speech be unlawful or misleading before it can be restrained.[3]

As to the asserted governmental interest under the *Central Hudson* test, the SEC indicates the need to "protec[t] investors by regulation of the activities of investment advisory publishers" and "to recognize under federal law the fiduciary relationship that exists between investment advisory publishers and their clients." *SEC Opposition Brief* at 9-10, *citing to SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). *Capital Gains Research Bureau,* however, provides no authority for the proposition that speech may be regulated in order to protect investors in the absence of a showing that the speech is false and misleading or colored by self-interest.[4]

3. Both the SEC and the majority below rely upon *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970), as authority for the proposition that financial newsletters such as those published by Petitioners are subject to prior restraints due to the limited protection afforded commercial speech. In that action seeking enforcement of a SEC subpoena, however, the issue on appeal was whether the initial determination as to whether a financial newsletter was required to register or instead qualified for the Investment Advisers Act's exemption for "bona fide newspapers" should be made by the SEC or the district court. Significantly, while the court held the initial determination should be made by the SEC and that for such purpose it needed the subpoenaed documents, the ruling neither forced the paper to register nor barred it from publication. Indeed, the court noted that the Investment Advisers Act did not provide authority for a prior restraint, even of commercial speech: "[E]ven if a newspaper is engaging in commercial practices which may be regulated, the Act grants no authority for review or censorship by the Commission of investment advisory material prior to its publication." 422 F.2d at 1380, n.13.

While the *amicus* agrees that the governmental interest in protecting the investing public against fraudulent activities on the part of investment advisers is substantial, it is submitted that this interest is not directly advanced by application of the registration provisions of the Investment Advisers Act to disinterested publishers such as Petitioners who neither act in a fiduciary relationship with their subscribers through, *e.g.*, effectuating purchases and sales of securities on their behalf, nor have been shown to engage in the kinds of practices, such as scalping, which render the advice published deceitful.

Even assuming *arguendo* that suppression of Petitioners' speech is necessary for the effectuation of the stated interest in protecting investors, the injunctive relief authorized below will not accomplish that result. As the majority decision below makes clear, Lowe is not prohibited from making investment recommendations "in someone else's bona fide newspaper as an employee, editor or

4. That case, unlike the present one, involved a publisher who was engaging in the practice of "scalping," *i.e.*, purchasing securities for his own account shortly before recommending the security for long term investment in his publication and then selling the shares at a profit as soon as the market price rose following his recommendation. Holding that such practice constituted the rendering of deceitful advice in the absence of full disclosure as to the investment adviser's self-interest in the effect of his recommendation, this Court still did not enjoin further publication. Rather, it affirmed an order calling for disclosure when such self-interest existed.

writer," 725 F.2d at 902, but only is restrained from making such recommendations in his own publications. By its own terms, therefore, the prior restraint fails another of *Central Hudson*'s tests, for it will not serve to "directly advance" the government's asserted interest in prohibiting potentially deceptive speech. As was stated by Judge Brieant in dissent:

> I fail to see how it can be adjudged that Lowe can exercise his First Amendment protected expressions as to investments, but only so long as he is not himself the owner or proprietor of the publication in which his views appear. Such a distinction must assume that the owner or proprietor of a *bona fide* newspaper will exercise some control over Lowe's writings so as to prevent fraud. There is no assurance that this would be so.

SEC v. *Lowe*, 725 F.2d at 908.

The challenged restraint finally must be overturned because of its failure to meet the last *Central Hudson* test for a permissible restriction on commercial speech: whether the restraint imposed is "more extensive than is necessary" to serve the asserted governmental interest (here, in protecting investors from receiving deceptive investment advice or advice colored by self-interest). In prohibiting speech which has not been shown to be flawed, predicated solely on Lowe's prior misconduct not related to the publishing activities in issue, the injunction here in issue plainly sweeps too broadly to be constitutionally permissible[5]

5. The SEC and the majority below contend that *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), is dispositive as to the propriety of the prophylactic rule imposed here. *Ohralik*, however,

(footnote continued on next page)

III. The broad potential reach of the SEC's interpretation of the Investment Advisers Act to the activities of publishers must be narrowed in order to preserve First Amendment interests.

A. The SEC's interpretation of the Investment Advisers Act has potentially far-reaching consequences for publishers

Consideration of the proper result in this action should not lose sight of the potential scope of regulation of disinterested publishers under the Investment Advisers Act which the decision below invites. The annexed Appendix contains an illustrative listing of recent books which contain material of a similar overall nature to that found in Petitioners' newsletters. This random sampling of works suggests the potential reach of the SEC's censorship authority under the SEC's, and the court of appeals', interpretation of the Investment Advisers Act. Provided only that a publisher cross the ill-defined line between "bona fide" publications "of general and regular circulation" (an exempt category of publication under the Act) and publications "as to the value of securities or as to the advisability of investing in, purchasing or selling securities" (a description of activities regulated by the Act),

differs from the case at bar in two critical respects. First, it involved an in-person solicitation of clients by an attorney and, second, the attorney was shown to have engaged in the exact kind of misconduct sought to be prevented by the prophylactic rule against in-person solicitation of business. The instant case is more appropriately analogized to *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), which involved published advertisements concerning the availability of routine legal services. Here, as in *Bates* but unlike in *Ohralik*, there is no personal or intimate contact between the speaker and the recipients of the expression and there has been no showing that the speech sought to be prevented by the regulation is misleading or oppressive.

it would be subject to a claim by the SEC that it register and otherwise be subject to the SEC's licensing authority.

It is to be noted in this connection that in 1977, the SEC attempted to clarify the reach of the Investment Advisers Act to publishers by issuing an interpretative release, *Applicability of Investment Advisers Act to Certain Publications,* 17 C.F.R. § 276.563 (1984), 42 Fed. Reg. 2,953 (1977) (Securities and Exchange Commission Release No. IA-563). This Release, however, falls far short of affording adequate protection to the publishers of works whose independent authors write on topics which the SEC subsequently may determine constitute the rendering of investment advice within the definition of the Act. Among other things, the Release states that

> the definition of investment adviser should not be construed to include the author or publisher of any book, pamphlet, or article (1) which does not contain any recommendations, reports, analyses, or other advisory information relating to specific securities or issuers and (2) which is not one of a series of publications by such person or intended to be supplemented or updated, *provided* That the author or publisher has not and does not intend to engage in any other activities which would bring him within the definition of investment adviser.

17 C.F.R. § 276.563, 42 Fed. Reg. 2,953 (footnotes omitted).

It is plain that such guidelines do little to insulate disinterested publishers from potential regulation under the Investment Advisers Act. Indeed, the Release suggests that any publisher who merely publishes a book on the securities market with the expectation that it will subsequently be updated or revised may be subject to the Act's

registration provisions. Likewise, by suggesting the inapplicability of the Investment Advisers Act to publications which do not contain any recommendation, report, analysis, or advisory information relating to a specific security or issuer, the SEC would appear to be implying that any publications which do deal with such subject matters may be required to comply with its pre-publication registration provisions.

The SEC's broad conception of its regulatory reach is further indicated by the Release's note 5, which states that

> there may be publications which do not mention the name of a particular issuer or security, but refer only, for example, to an industry or class. Where the industry or class is very small, or for other reasons the issuer or security referred to is readily identifiable, registration could not be avoided merely because the issuer or security is not specifically mentioned.

The latitude that the SEC has afforded itself to regulate publishers under the Investment Advisers Act is indeed extraordinary. To permit the SEC to brandish such power over publishers would subject the press to precisely the kinds of pre-publication registration schemes specifically condemned throughout the nation's history. *See, e.g., Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963); *Near* v. *Minnesota,* 283 U.S. 697 (1931). *See also Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Rather than submit to such registration procedures,[6] or take the risk of incorrectly guessing whether a

6. The registration process is in fact burdensome. Pursuant to section 203(c), and SEC Form ADV, a registrant must furnish an elaborate personal history concerning each of its partners, officers,

(footnote continued on next page)

work is in fact covered by the Investment Advisers Act, it is all too likely that many publishers will simply choose not to publish any materials even remotely connected to subjects that the SEC views as falling within its domain. Such a chilling of publication is abhorrent to First Amendment principles. *New York Times Co.* v. *Sullvian,* 376 U.S. 254 (1964); *Smith* v. *California,* 361 U.S. 147 (1959).

The authority the SEC seeks to exercise over disinterested publishers does not, of course, end with this registration power. As previously discussed, what the majority decision below approved is the further power on the part of the SEC permanently and absolutely to prohibit publication of materials viewed as "potentially deceptive," without any required showing as to the false and misleading nature of such publications or the pecuniary interest of their publishers in the investments or investment advice discussed or provided.

Such wide-ranging, unique and unwarranted censorial power over the press should not be left to stand.

B. The SEC's view of its regulatory authority over publishers must be narrowed to avoid conflict with the First Amendment

Amicus submits that the Investment Advisers Act can be construed in a fashion which would permit the SEC to

directors and all other people who perform similar functions. This personal history must include such things as education and business affiliation (for the previous 10 years). Additionally, the registrant must provide the SEC with a description of its business and a balance sheet. Further, the SEC mandates that a publisher comply with additional disclosure requirements concerning its publishing business and how it conducts its research.

regulate where appropriate and in furtherance of the public interest while at the same time deprive it of the authority to impose unnecessary and dangerous registration and licensing requirements on publishers.[7] A narrowing of the broad authority sought and received in this action by the SEC would not in any way be unprecedented. *See, e.g., International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Daniel,* 439 U.S. 551, 556 n.20 (1979) and the cases cited therein.

The AAP believes that a construction of the Investment Advisers Act sensitive to First Amendment protections is one which would apply its registration and licensing provisions only to publishers whose publishing activities are inextricably intertwined with other investment advisory activities undertaken by them or who are shown to have a potential conflict of interest so that their publications may fairly be viewed as part and parcel of a commercial transaction involving investments in securities.[8] In such cir-

7. *SEC* v. *Suter,* 732 F.2d 1294 (7th Cir. 1984), is cited by the SEC as authority for the proposition that the registration requirements imposed by the Investment Advisers Act and the regulations promulgated thereunder by the SEC are not in conflict with the First Amendment. *SEC Opposition Brief* at 6-7. Although *amicus* submits that the Seventh Circuit incorrectly applied a commercial speech analysis in *Suter,* the holding there would not be dispositive even if the commercial speech doctrine were applicable. The basis for the Seventh Circuit's conclusion that an injunction could issue was the fact that Suter's newsletters had been found to be false and misleading and thus did not qualify for the limited protection afforded commercial speech under *Central Hudson. Suter,* 732 F.2d at 1299.

8. This construction of the Investment Advisers Act could be accomplished in any of several ways. While the SEC has consistently given a cramped interpretation to Section 202(a)(11)(D) of the Investment Advisers Act, which exempts "the publisher of any bona

(footnote continued on next page)

cumstances, the speech may fairly be viewed as commercial because it is part and parcel of a commercial transaction involving investments in securities. Where commercial speech is properly found, such a publication might appropriately be subject to some narrow form of regulation by the SEC in order to ensure that the existence of a potential conflict of interest does not result in false or misleading expression.

Where, on the other hand, as in the instant case, the sole activity is the publication of newsletters or other works without any accompanying handling of clients' funds or benefit to be received from investment actions taken by readers or from the specific investment recommendations published, the Investment Advisers Act should not be read to proscribe or otherwise limit such disinterested publishing activity.

Conclusion

The First Amendment should not be construed to allow the SEC to be the gatekeeper of the public's right to receive a wide range of investment information, dependent solely upon the SEC's determination as to the general fitness of the publisher, the value of speech not contended

fide newspaper, news magazine or business or financial publication of general and regular circulation" from the Act's definition of "investment adviser," there is nothing to preclude this Court from construing the publisher exemption more broadly. Alternatively, the definition of "investment adviser" could be read to exclude coverage of impersonally rendered and disinterested advice. Also, Section 202(a)(11)(F) of the Act, which provides for the exemption of "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulation or order," could be construed to exempt from SEC regulation disinterested publishers of investment newsletters.

to be other than truthful, or the status of works as "bona fide" publications of general and regular circulation.

Amicus respectfully urges that this Court reverse the holding of the majority below classifying Petitioners' newsletters as commercial speech subject to regulation by the SEC. *Amicus* further urges that the injunctive relief authorized below be held to be an unconstitutional prior restraint on speech under the First Amendment regardless of the classification afforded the speech here involved.

Respectfully submitted,

R. Bruce Rich
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorney for Amicus Curiae
Association of American Publishers, Inc.

Lauren W. Field
Weil, Gotshal & Manges
Of Counsel

APPENDIX

Appendix

Books Which Contain Material Of A Similar Overall Nature To That Found In Petitioners' Newsletters

The Aggressive Conservative Investor

Martin Whitman & Martin Shubik
Random House, Inc. 1979

The Complete Book of International Investing:
How to Buy Foreign Securities and
Who's on the International Investment Scene

Rainer Esslen
McGraw-Hill, Inc. 1977

Contrarian Investment Strategy

David Dreman
Random House, Inc. 1980

Dun & Bradstreet's Guide to Your Investments: 1984

C. Colburn Hardy
Harper & Row, Publishers, Inc. 1984

Everybody's Investment Book:
How to Invest Up to $5,000 If You Don't Have It

Dan Malca and Sandy Choren
Bantam Books, Inc. 1984

Financial Tactics and Terms for the
Sophisticated International Investor

Harry David Schultz
Harper & Row, Publishers, Inc. 1974

The Handbook of Financial Futures: A Guide
for Investors and Professional Financial Managers

Nancy H. Rothstein & James M. Little
McGraw-Hill, Inc. 1983

The Handbook of No-Load Funds
Investors, 1983 edition

Sheldon Jacobs
McGraw-Hill, Inc. 1983

How to Buy Money: Investing
Wisely for Maximum Return

Wayne F. Nelson
McGraw-Hill, Inc. 1982

How to Buy Stocks, 7th edition

Louis Engel & Brendan Boyd
Bantam Books, Inc. 1984

How to Cash In on the Coming
Stock Market Boom

Myron Kandel
Bobbs-Merrill Co., Inc. 1982

How to Forecast Interest Rates: A Guide
to Profits for Consumers, Managers & Investors

Martin J. Pring
McGraw-Hill, Inc. 1981

How to Invest your Money and Profit from Inflation

Mort Shulman
Random House, Inc. 1980

The Intelligent Investor: A Book of
Practical Counsel, fourth revised edition

Benjamin Graham
Harper & Row, Publishers, Inc. 1973

Investment Analysis & Management, 2nd edition

Jack C. Francis
McGraw-Hill, Inc. 1976

Investment Strategy

Robert Coates
McGraw-Hill, Inc. 1978

Management of Investments

Jack C. Francis
McGraw-Hill, Inc. 1983

New Contrarian Investment Strategy

David Dreman
Random House, Inc. 1982

Only Investment Guide You'll Ever Need

Andrew Tobias
Bantam Books, Inc. 1983

The Paine-Webber Handbook to Stock and Bond Analysis

Kiril Sokoloff
McGraw-Hill, Inc. 1979

The Phoenix Approach: The Contrarian Investor's Guide to Profiting from Out-of-Favor, Distressed and Bankrupt Companies

William J. Grace, Jr.
Bantam Books, Inc. 1984

The Professional's Investment Guide for Executives and Professionals

Martin Schulman
Acropolis Books, Ltd. 1971

The Questioned Stock Manual: A Guide to Determining the True Worth of Old and Collectible Securities

Albert F. Gargiulo and Rocco Carlucci
McGraw-Hill, Inc. 1979

70% Off! The Investor's Guide to Discount Brokerage

Mark D. Coler, assisted by Ellis M. Ratner
Facts On File, Inc. 1983

Simple Facts About How To Have More Money

Ferd Nauheim
Acropolis Books, Ltd. 1983

Stock Market Strategy

Richard A. Crowell
McGraw-Hill, Inc. 1977

The Stock Options Manual, 2nd edition

Gary L. Gastineau
McGraw-Hill, Inc. 1978

Street-Smart Investing: A Price & Value Approach to Stock Market Profits

George Clairmont and Kiril Sokoloff
Random House, Inc. 1983

Technical Analysis Explained: An Illustrated Guide for the Investor

Martin J. Pring
McGraw-Hill, Inc. 1980

The Thinking Investor's Guide to
the Stock Market, revised edition

Kiril Sokoloff
McGraw-Hill, Inc. 1978

William Donoghue's No-Load Mutual Fund Guide

William Donoghue & Thomas Tilling
Bantam Books, Inc. 1984

Winning the Investment Game:
A Guide for All Seasons

James H. Gibson
McGraw-Hill, Inc. 1984

Winning: The Psychology of Successful Investing

Srully Blotnick
McGraw-Hill, Inc. 1978

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No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

CHRISTOPHER L. LOWE, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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[redacted] BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MICHAEL R. KLEIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-4141
Attorney for Amicus Curiae
American Civil Liberties Union

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

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CHRISTOPHER L. LOWE, ET AL.

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

MOTION BY THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Civil Liberties Union respectfully requests leave to file the attached brief in this case as *amicus curiae*.[1]

[1]A partner of counsel for *Amicus* is personally disqualified from participation in this case by virtue of prior service with the Respondent. He and the firm have, consistently with DR 9-102 of the Code of Professional Responsibility of the District of Columbia Bar, filed letters with the Parties which attest to the firm's procedures to screen the disqualified partner from any participation in the case. The firm has been advised orally by the Parties that they do not object to the firm's representation of the *amicus curiae*.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit organization with over 200,000 members. The ACLU has been dedicated for over 60 years to the protection of personal liberties through defense of the civil liberties embodied in the Bill of Rights. One of the major thrusts of the ACLU's efforts has been the protection of the First Amendment guarantees of freedom of speech and freedom of the press.

To this end, the ACLU and its local affiliates appear frequently in the United States District Courts, Courts of Appeal, and the Supreme Court as counsel of record or as *amicus curiae* in First Amendment cases. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1942); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Through those appearances, they have developed substantial expertise in this area of the law.

This case is of great concern to the ACLU. The Petitioners and Respondent urge that resolution of this case requires the Court to address serious and substantial First Amendment questions concerning the licensing provisions of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, *et seq*. In the view of the ACLU, a less confrontational analysis is available. It offers, through this brief, a statutory avenue to a just and constitutional resolution of this case not presented by the parties: an exemption from the Advisers Act applicable to Petitioners. If, however, the Court believes that it must or should attempt to resolve whether the Advisers Act poses a degree of regulatory infringement on speech and the press that is permissible under the First Amendment, the ACLU addresses that issue as well.

For the foregoing reasons, the ACLU respectfully requests that this motion be granted and the attached brief be filed. Counsel for Petitioners and Respondent have orally advised Counsel for the ACLU that they will consent to its filing of a brief *amicus* by the ACLU.

MICHAEL R. KLEIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Attorney for Amicus Curiae
American Civil Liberties Union

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*Cases or authorities chiefly relied upon are marked by asterisks.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Respondent seeks to forbid Petitioner from publishing an investment newsletter and from operating a telephone "hot line" of recorded messages containing investment information because Petitioner was, in 1977 and 1978, convicted of crimes relating to the conduct of an investment advisory business.

Respondent argues that, given Petitioner's criminal record, he is disqualified from serving as an "investment advisor" within the meaning of the Investment Advisers Act, 15 U.S.C. § 80b-1 (the "Advisers Act") and, therefore, may not publish or disseminate investment information to the general public through the medium of newsletters or the maintenance of recorded telephone messages.

Respondent's position rests upon two flawed assumptions: First, that publication and sale of newsletters containing investment information is the equivalent of rendering investment advice within the meaning of the Advisers Act; and, second, that the government may forbid the publication of newsletters directed to the general public whenever it may forbid face-to-face advisory activity.

In fact, the Advisers Act exempts from its coverage "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Section 202(a)(11)(d), 15 U.S.C. § 80b-2(a)(11)(d). However, even if the publication of an investment newsletter falls within the Advisers Act, the First Amendment forbids the imposition of an absolute prior restraint on publication which is keyed, not to the allegedly harmful nature of a

particular statement, but to the past activities of the speaker.

ARGUMENT

I. Congress Did Not Intend That Persons Such As Petitioners Should Be Subject to the Advisers Act

The legislative findings in Section 201 of the Advisers Act, 15 U.S.C. § 80b-1, as well as the definition of investment advisers in Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11), indicate that Congress intended to regulate any person, not otherwise exempted, "who for compensation, engages in the business advising others, . . . *through publications* . . . or who, for compensation and as part of a regular business, issues or *promulgates analyses or reports* concerning securities. . . ." (Emphasis added).

However, Congress also intended to reduce, if not altogether avoid, conflict between the Advisers Act and the First Amendment by including among those who were specifically exempted from the Advisers Act "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Section 202(a)(11)(D), 15 U.S.C. § 80b-2(a)(11)(D). The parties to this case all appear to assume that this "publishers' exemption" is inapplicable. The ACLU believes that their assumption is incorrect.

A thorough review of the legislative history of the publishers' exemption suggests that its application to Petitioners is more likely than the parties have assumed.[2] In addition, ACLU urges the Court to treat the publishers' exemption with great care so as to give maximum effect to the obvious intent of the Congress to avoid through the publishers' exemption, if not in this case then certainly in many others,[3] precisely the kind of constitutional confrontation urged upon it in this case. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979); *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

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[2]The Court below avoided the publishers' exemption by adopting, as its own, a test of the exemption found in *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1378 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), a *subpoena* enforcement case not raising the prior restraint issue: "whether or not a specific publication is engaged in practices which the [Advisers] Act was intended to regulate" and by the bald assertion that bona fide newspapers are not within the "regulatory interest." 422 F.2d at 1372. Such tests, however, are circular. They eviscerate both the publishers' exemption and the First Amendment concerns that underlie the exemption. If a publisher engaged in no practices the Advisers Act was intended to regulate, that publisher would have no need for the publishers' exemption. Clearly, a court must look outside that circle for guidance. Otherwise the only rationale revealed by the opinion below, for enforcement of this otherwise classic infringement on the constitutional freedom of the press from Congressional abridgement, is that Congress passed a statute. That rationale simply cannot suffice.

[3]Several other cases, resolvable in whole or in part by the publishers' exemption are now pending, including one, *Wall Street Publishing Institute, Inc. v. SEC*, No. 84-5485 (D.C. Cir.), which has been stayed pending the Court's resolution of this case. *See also SEC v. Financial News Association*, Civil Action No. 84-0878-A (E.D. Va.) and *SEC v. Options Strategy Associates, Ltd.*, Civil Action No. 84-4316 (S.D.N.Y.)

When the 1940 Congress enacted the Advisers Act it foresaw the potential for conflict between the freedom of the press and unyielding regulation of investment advice transmitted through the printed media. Specifically, the 76th Congress was quite aware of the potential for abuses by publishers of the general type it otherwise sought to foreclose through the Advisers Act, but concluded for constitutional, legal and practical reasons to forego licensing or regulation of the content or editorial practices of publishers through the Advisers Act. It did this through the publishers' exemption.

The Advisers Act was the end result of a study mandated by Congress five years earlier. Section 30 of the Public Utility Holding Company Act of 1935 authorized and directed the SEC to study investiment trusts and companies "and to report the results of its study and its recommendations to the Congress. . . ." Ch. 687, 49 Stat. 803, 837 (1935), 15 U.S.C. § 79(2)-4 (1982). That "Investment Trust Study" was run, for the most part, by its Chief Counsel, David Schenker. He became the *de facto* author of both the Advisers Act and the accompanying Investment Company Act of 1940, Ch. 686, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. § § 80a-1, *et seq.* (1982)). He was also the principal SEC witness throughout the hearings conducted jointly with respect to both bills.

The floor discussion germane to the publishers exemption consisted of little more than a summary by the respective sponsors (Senator Wagner and Congressman Lea) of the then proposed language of the publisher's exemption with-

out further comment.[4] The references in the Committee reports are similar and neutral. However the intended relationship between the publishers' exemption and the Congress' First Amendment concerns was elsewhere made clear. Mr. Schenker, who was the *de facto* author of at least the originally introduced version of the Advisers Act and

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[4]As initially introduced on March 14, 1940, the publishers' exemption was limited to "the publisher of any bona fide newspaper or newsmagazine of general circulation." S. 3850 and H.R. 8935, 76th Cong., 3d Sess., § 45(a)(16)(c) (1940). In this version, the text of the exemption was set forth in the general definition section (§ 45) of the accompanying bill proposing an Investment Company Act and merely incorporated by reference in proposed Section 203 of the proposed Advisers Act. That draft was expanded on June 6, 1940, to include two additional concepts: (1) business and financial publications; and (2) the notion of regularity of publication. Committee Prints of S. 3850 and H.R. 8935, 76th Cong., 3d Sess., June 6, 1940. As then revised, it read, as it did when enacted: "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." While the June 6th revision obviously expanded the exemption, nothing in the floor discussion explains the rationale for the choice of words, nor indeed for the phrasing of any version of the exemption. As to the phrase "bona fide," which was not considered below to be dispositive, the ACLU does not believe the Congress intended the phrases to be translated as "good faith," its literal meaning. A construction of the phrase more consistent with the draftmen's intent, and with constitutional principles, would be "genuine." Given this construction, the Congress can be seen to have attempted to distinguish a publication that genuinely was generally and regularly circulated by one engaged in the publishing business, and thus within the traditional umbra of the constitutionally protected press, from private communications between advisers and their clients, dressed up to appear to be newspapers, news magazines or business or financial journals.

the principal SEC witness on the legislation, sought and obtained permission to place in the record of the Senate Hearings two related memoranda provided for the Investment Trust Study by the Research Department of the Illinois Legislative Counsel.[5] The first memorandum surveyed the regulation of "investment counselors" among the States; the second, entitled "Statutory Regulation of Investment Counselors", summarized the principal practical, legal and constitutional issues thought to be involved in regulating investment advisers.

Reproduced below are the most germane sections of the memorandum that addressed the problems then foreseen were the Congress to elect to regulate publishers of investment advice. This text evidences that the SEC which submitted the memorandum as evidence of its own thinking, as well as the Congress, were quite aware of abuses, past and potential, by publishers of investment information and advice, as such, but that a variety of practical, legal and constitutional problems led both the SEC and the Congress to conclude that it was at least wise, and probably constitutionally essential, to provide a broad exemption for publishers from the Advisers Act:

> *"Publishers of Investment Advice*
>
> A particular problem in defining the application of a law regulating investment counselors arises from the existence of individuals and firms who furnish invest-

[5] *Hearings on Investment Trusts and Investment Companies, S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess., 1004-1016 (Apr. 26, 1940) (hereinafter "Hearings").

> ment advice solely by means of publications. Insofar as such individuals and firms also render specialized advice to individual clients, they might be subject to any regulatory measure that may be adopted. The question arises, however, as to whether or not services which give the same general advice to all their clients, by means of some circular or other publication, are actually engaged in a type of investment counseling as to which regulation is feasible.
>
> * * *
>
> These investment services which function through publications sent to their subscribers, rather than through individualized advice, would present several difficulties not found in regulating investment counselors generally. In the first place, the large number of agencies publishing investment facts and interpretations is well known, and a very large administrative staff would be required to enforce detailed regulation. Secondly, such information is supplied both by newspapers and by specialized financial journals and services. The accepted rights of freedom of the press and due process of law might prevent any general regulation and perhaps also supervision over particular types of publications, even if the advertisements of these publications occasionally quite exaggerate the value of the factual information which is supplied. That the constitutional guarantee of liberty of the press is applicable to publications of all types, and not only to newspapers, has been clearly indicated by the United States Supreme Court in the following terms:

'The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historical weapons in defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press, in its historical connotation, comprehends every sort of publication which affords a vehicle of information and opinion.' [Citing *Lovell v. City of Griffin*, 303 U.S. 444 (1938).]

To the problem of formulating reasonable and practicable regulations for the factual services must, accordingly, be added legal and constitutional difficulties inherent in the attempted regulation of any individual or organization functioning primarily by means of published circulars or volumes. However, liberty of the press is not an absolute right, and some types of regulation may be both constitutional and feasible, assuming that regulation of some sort is thought desirable. *Such regulation could probably not legally take the form of licensing publications or prohibiting certain types of publications. Regulation of the publishing of investment advice in order to conform with constitutional requirements, would probably have to be confined to punishing, by civil or criminal penalties, those who perpetrate or attempt to perpetrate frauds or other specific acts declared to be contrary to law.*[6]

* * *

[6]Hearings at pp. 1008–1009. (Emphasis added, footnotes omitted.)

Finally, in the memorandum's self-described "Summary" appears the observation:

> In the case of so-called investment counselors who function only by means of publications, a special problem would arise with regard to possible regulation. It would be necessary to develop a type of regulation which would not violate accepted principles of freedom of the press.[7]

Accordingly, it seems quite clear that the 76th Congress considered the publishers' exemption to be precisely that, an exemption from the licensing requirement of sufficient breadth to preclude raising First Amendment issues. This then leads, the ACLU submits, to an inquiry into what the 76th Congress understood those issues to be: its understanding of freedom of the press in 1940.

When Congress enacted the Advisers Act, its concept of what was protected by the First Amendment's press guarantees was largely, if not entirely, defined by *Near v. Minnesota ex re Olson*, 283 U.S. 697 (1931), *Lovell v. City of Griffin*, 303 U.S. 444 (1938) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Both *Lovell*, cited and quoted from in the memorandum *supra*, and *Cantwell* rejected on First Amendment grounds licensing requirements as applied to religious publications, *Cantwell* in the commercial context of "fraud." Although *Near* did not involve licensing as such, the Court noted therein that the First Amendment grew out of the experience in England of abuses of the "licensor." 283 U.S. at 713.

[7]*Id.* at 1015–1016.

An additional historic observation is relevant to the search for the understanding of the 76th Congress about the First Amendment. That observation is this. The Advisers Act was enacted two years before the Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), first articulated the "commercial speech doctrine." So that if, consistent with the Court's longstanding approach to constitutional cases, the Court's first effort should be to divine the intent of the 76th Congress legislating in 1940 so to avoid a needless collision between the Advisers Act and the First Amendment's protection of freedom of the press, the subsequently developed doctrine of commercial speech could well be deemed irrelevant.

A strong case can therefore be made that Petitioners are within the publisher's exemption. Their publications are available to all who wish to subscribe to them. While they apparently do provide advice with respect to identified securities, the advice is general in that it is not tailored to the investment portfolios or objectives of particular subscribers. The parties appear to dispute the regularity of the advice but, as the District Court noted, any irregularity is likely a function of their continuing battles with the government. Most important, as noted above, in assessing whether the publishers' exemption is applicable here, the Court should recognize that a liberal interpretation of the exemption is consistent with the intent of Congress to avoid constitutional conflict.

II. Assuming Petitioners Are Not Exempt From the Advisers Act, the Broad Prior Restraint imposed on Petitioners Under the Advisers Act Exceeds Constitutional Boundaries

As the parties have presented this case thus far, it poses a series of formidable constitutional issues related to (1) commercial speech, (2) commercial activity in which expression is an essential component and (3) the extent to which the Advisers Act's authorization of a prior restraint is permitted in either case. The ACLU believes that (1) commercial speech is not at issue here, (2) commercial activity in which speech is an essential component is the proper analytic rubric, (3) but that in either event, tested solely on First Amendment grounds, the broad prior restraint imposed upon Petitioners by operation of the Advisers Act, exceeds that necessary to protect the governmental interest and is thus constitutionally infirm.

A. Petitioners' Newsletters and Hotline Do Not Constitute Commercial Speech

As just noted, it was in 1942, two years after the enactment of the Advisers Act, that this Court concluded for the first time, and without citation, that there is a type of expression susceptible of being characterized as "commercial" and that such "commercial speech" is not entitled to the full protection the First Amendment affords to "political speech." *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Having drawn that distinction, the Court has since faced the inevitable, continuing burden of defining "commercial speech."[8]

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[8]The Court has itself acknowledged its historic difficulty with the *Valentine* notion. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 759–761 (1976). In the last ten years, this Court alone has found it necessary to define the nature of and the constitutional protection afforded "commercial speech" in no fewer than nine cases. See note 9, *infra*.

At this writing, it appears reasonably settled that purely commercial advertising is commercial speech.[9] However, Petitioners' newsletters and hotline clearly are not mere advertising. Their content consists of consumer information and advice. There is no evidence to suggest that Petitioners are paid by the subjects of the advice to advertise, sell or promote the sale of the securities analyzed in the newsletter or hotline. The Court has also said that commercial speech includes communications which do no more than simply propose a commercial transaction, presumedly between the parties to the proposed transaction.[10] Petitioners' activities clearly do not fit that definition either. There is no evidence to suggest that Petitioners are purchasers, sellers, issuers, underwriters, or brokers with respect to the securities about which they inform and advise their subscribers.

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[9]*See Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (1982) (advertising legal services); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (advertising on billboards); *Central Hudson Gas & Electric Corp. v. Public Service Commission*,447 U.S. 557 (1980) (advertising electrical power); *Friedman v. Rogers*, 440 U.S. 1 (1979) (use of trade name in advertising optometric services); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (proposal to provide legal services for profit); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertising legal services); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 1977 (advertising houses); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertising abortions); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (advertising jobs).

[10]*Bolger v. Youngs Drug products Corp.*, 463 U.S. 60 (1983); *Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975); *Pittsburgh Press Co. v. Pittsburg Commission on Human Relations*, 413 U.S. 376, 385 (1973).

Accordingly, since Petitioners' activities do not fall within either of the accepted tests of commercial speech, Respondent urges an expansion of the "commercial speech doctrine" to include more than advertising, more than communications between buyer and seller proposing a transaction. Respondent has looked for support to a phrase the Court has used on at least two occasions in recent years: "expression related solely to the economic interests of the speaker and its audience" to describe commercial speech.[11] That description, however, is not the holding of any case. Moreover, the description has disabling infirmities as the definition of a category of lesser protected speech.

A significant number of activities and enterprises long deemed entitled to the full panoply of First Amendment protections could be described as communications related solely to commercial or economic interests. These include such specialty magazines as *Consumer's Reports* and the *Kiplinger Letter*, such television programs as *Wall Street Week*, and such important elements of the general print media as the *Wall Street Journal* and the financial sections of most major daily newspapers and innumerable magazines. Probably for that reason, the Court recently did not apply the commercial speech doctrine in a First Amendment case involving precisely the kind of published commercial advice rendered to subscribers that is present here. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984).

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[11]*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980); *In Re R.M.J.*, 455 U.S. 191, 204 n.17 (1982).

Experience teaches that distinctions susceptible of being drawn between publications on the basis of their "political" or "commercial" character, are too facile to serve as First Amendment doctrine. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). More than one contemporary political contest has been affected by such intrinsically *commercial* concerns as the extent to which automobiles of foreign import, rather than those domestically produced, are widely purchased and sold. To treat communications that evaluate automobiles such as *Motor Trend Magazine* and others, as lesser protected commercial speech would, therefore, do undue violence to the First Amendment.

Stripped of peripheral features so as to reveal their constitutional skeleton, Petitioners newsletters and hotline are publications of factual information, opinion and recommendations to an audience that petitioners restrict to those who pay for such information, opinions and recommendations ostensibly to help them make commercial (investment) decisions. Too much communication worthy of full First Amendment protection falls into that category. Accordingly, while, as the Court noted in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), it may be too much or too late to suggest that the commercial speech doctrine should never have been articulated, experience suggests that the Court has wisely restricted its scope. It would be unwise to disregard the extent to which the expansion of the doctrine urged by Respondents would measurably increase the burden of its application and the danger of its misapplication. As the Court noted in *Virginia Pharmacy:*

> "So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Virginia Pharmacy*, 425 U.S. 765 (citations omitted).

Accordingly, the ACLU urges the Court not to expand the reach of the commercial speech doctrine to deprive speeches and publications of their full First Amendment protection either because they are only provided to subscribers, or because their content is essentially commercial, or both. The cost of such an expansion of the commercial speech doctrine will be to burden the first Amendment and this Court with the continuing need to define and measure an encroachment on press and speech freedoms not consistent with our constitutional history, nor required to protect the regulatory interests reflected in the Advisers Act.

B. Even if Petitioners Newsletter and Hotline Constitute Mere Components of Speech Incidental to Commercial Activities, the Prohibition on All Publishing by Petitioners Constitutes an Excessive and Thus Impermissible Prior Restraint

The second theory asserted by Respondent in response to Petitioners' First Amendment assertions rests on the line of cases that permit regulation of commercial activity, including the practice of professions, in which speech and publication "is an essential but surordinate component." *Ohralik v.*

Ohio State Bar Association, 436 U.S. 447, 457 (1978). The ACLU believes that this theory is a reasonable way to analyze the First Amendment interest in Petitioners' publications and speech.

The Court has long recognized a strong governmental interest in the protection of consumers through, *inter alia*, the establishment and maintenance of standards among the licensed professions. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460 (1978) (lawyers); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) (engineers); *Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 766 (1976) (pharmacists); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (opticians); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935) (dentists).

Accordingly, *amicus* assumes that Petitioner's past criminal activity would justify Respondent's refusal to permit Mr. Lowe to engage in face-to-face investment advisory activity. *Ohralik v. Ohio State Bar Association*, *supra*. However, merely because the power to regulate face-to-face commercial activity exists, the government does not necessarily possess the power to impose an absolute prior restraint on the publication of a newsletter aimed at the public. As a comparison of *Ohralik* with *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *In re Primus*, 436 U.S. 412 (1978) reveals, the power to regulate face-to-face activity does not automatically carry with it the power to forbid activity with more substantial First Amendment connections and less substantial risk to governmental interests. Whatever the government's power to regulate face-to-face conduct, Respondent lacks the power to impose an absolute prior restraint on Petitioner's newsletter premised, not on its contents, but on his past activity.

The ban on prior restraints is the most significant protection imposed by the First Amendment on government attempts to restrict the flow of information. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *United States v. New York Times Co.*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). While disputes have arisen over the scope of the government's power to obtain a prior restraint in both commercial and noncommercial contexts, the cases have uniformly arisen as a result of government claims that a particular communication will cause so much harm that the government is entitled to seek to prevent the harm by preventing the speech. As cases like *United States v. New York Times*, *supra*, and *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) demonstrate, the burden of proving insufficient harm to justify the prior restraint of a given message is extremely high.

This case, however, does not involve an attempt to restrain a particular message. Rather, the government seeks a prior restraint on a newsletter based, not on the allegedly harmful nature of its contents, but solely on the status of its publisher. Whatever the government's very limited power to seek prior restraints based on the harm flowing from the content of a given communication, no power exists to impose a prior restraint based on the status of a speaker.[12] If there is

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[12]The Court has confirmed that the First Amendment protects the rights of prisoners to communicate, *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974), and even where the Court has recognized limits to the First Amendment rights of those incarcerated for crimes it has carefully evaluated the necessity of the regulatory limits. *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119 (1977).

any absolute in the Constitution, it is an absolute ban on prior restraints based on a speaker's past acts. *Near v. Minnesota*, *supra* (prior restraint on future publication based on past acts unlawful).

Of course, to argue that Respondent may not impose a prior restraint on Mr. Lowe based solely on his past acts, is not to suggest that the public may not be effectively protected from the possibility of fraudulent information. Numerous alternatives short of an absolute prior restraint are available to the SEC including (1) enforcement of the antifraud provisions of Sections 206, 208 and 209 of the Advisers Act, 15 U.S.C. § 80b-6, 8 and 9, and (2) the device noted with approval in *Virginia Pharmacy*, 425 U.S. at 772, n.24, *Central Hudson*, 447 U.S. at 365 and *Bates*, 433 U.S. at 384, to wit: a required disclosure to Petitioners' subscribers that warns them of the Petitioner Lowe's criminal record arising from conduct relating to investment advisory activities. Elsewhere in the federal securities laws, Congress and the Respondent have chosen precisely that disclosure approach to deal with persons previously convicted or found responsible in civil enforcement proceedings for misconduct relevant to their activities in the securities industry. See Regulation S-K, Item 401(f)(2), C.F.R. § 240.401(f)(2) (1984). The Respondent offers no reason why that lesser imposition will not suffice here.

Accordingly, the ACLU submits that the prior restraint imposed here exceeds constitutionally permissible limits.

CONCLUSION

This case does not require, nor should the Court proceed as though it does, resolution of such general questions as the scope of the commercial speech doctrine or the propriety of the restraint that the parties believe to be imposed on Petitioners under the Advisers Act. Petitioners are exempt from the Advisers Act licensing requirements under the publishers' exemption. The ACLU urges affirmance of the order below on that ground alone.

Respectfully submitted

MICHAEL R. KLEIN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C.
Counsel for Amicus Curiae
American Civil Liberties Union

FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1984

CHRISTOPHER L. LOWE, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

BRUCE N. KUHLIK
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ALAN ROSENBLAT
Assistant General Counsel

DAVID A. SIRIGNANO
Assistant General Counsel

GERARD S. CITERA
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether the First or Fifth Amendment renders invalid the authority granted the Securities and Exchange Commission by the Investment Advisers Act of 1940 to deny or revoke the registration of a publisher of an investment advisory service on the basis of prior criminal conduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 725 F.2d 892. The opinion of the district court (Pet. App. A41-A67) is reported at 556 F. Supp. 1359.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1984. A petition for rehearing was denied on February 22, 1984. The petition for a writ of certiorari was filed on May 16, 1984, and granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Petitioner Christopher L. Lowe is the president of three corporations—petitioners Lowe Management Corporation, Lowe Publishing Corporation and Lowe Stock

Chart Service, Inc.—through which he has published and distributed two subscription investment advisory services and has solicited subscriptions for a third (Pet. App. A3, A9). Between March 29, 1974, and May 11, 1981, Lowe Management was registered with the Securities and Exchange Commission as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act of 1940 (the Act), 15 U.S.C. 80b-3(c) (Pet. App. A3; C.A. App. 132). In addition to furnishing investment advice through publication, Lowe Management had custody of and managed the funds of advisory clients on a discretionary basis during this period (J.A. 8, 28).

In 1977, Lowe pleaded guilty to two New York misdemeanors related to his investment advisory business. The first offense involved Lowe's fraud on one of his advisory clients by falsely representing that $2,200 had been invested for the client's benefit and a 27% return earned, when in fact Lowe had misappropriated the funds for his own use, in violation of N.Y. Gen. Bus. Law § 352-c (McKinney 1968). The second offense arose from Lowe's failure to register in New York as an investment adviser, in violation of N.Y. Gen. Bus. Law § 359-eee (McKinney 1968). Pet. App. A3. In April 1978, Lowe was sentenced to a three-year period of probation for the first of these offenses and received an unconditional discharge on the second offense (J.A. 9).

In 1978, Lowe pleaded guilty to two more New York offenses, both felonies (Pet. App. A3-A4). The first was again associated with Lowe's advisory business and, once again, concerned the misappropriation of a client's funds. Beginning in 1976, a client who had entrusted $10,000 to Lowe for investment purposes became dissatisfied with his accounting for the money and requested its return. When Lowe failed to return the funds, the client filed complaints with both the Commission and New York authorities (J.A. 66). On at least five separate occasions Lowe tendered a check in settlement, and each time the check was dishonored (*ibid.*). Payment from Lowe was

obtained only when criminal proceedings were instituted against him in state court by the New York authorities (J.A. 66-67).

During those proceedings, Lowe offered as evidence of his purported payment to the client a copy of a money order altered to read $10,000 instead of its true value, $10 (J.A. 10). For this fraudulent attempt to demonstrate to the court that he had paid his former client the full $10,000 owed to him, Lowe was convicted of tampering with physical evidence, in violation of N.Y. Penal Law § 215.40 (McKinney 1975) (Pet. App. A3; J.A. 10).

The second felony conviction resulted when Lowe fraudulently drew a check for $684 (J.A. 10) on his account at Manufacturers Hanover Trust Company, into which he had deposited worthless checks drawn on a closed account (J.A. 68). Lowe was convicted for this conduct of third-degree grand larceny under N.Y. Penal Law § 155.30 (McKinney 1975) (Pet. App. A3-A4; J.A. 10). As a result of these two felony convictions, Lowe was sentenced in 1979 to a prison term of 60 days, to be followed by a probationary period of four years and ten months, and was ordered to make restitution of $8,227, with interest (J.A. 10).

b. In 1979, the Commission instituted administrative proceedings pursuant to Section 203(e) and (f) of the Act, 15 U.S.C. 80b-3(e) and (f), against Lowe and Lowe Management. Following an evidentiary hearing and an initial decision by an administrative law judge, the Commission issued an opinion on May 11, 1981, finding that Lowe willfully aided and abetted willful violations by Lowe Management of the antifraud provisions of the Act (J.A. 64-72).[1] The Commission found that Lowe breached his fiduciary duty to an advisory client when he improperly withheld the client's $10,000 and then made misstatements regarding its return, and that Lowe Man-

[1] *In re Lowe Management Corp.*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,873 (May 11, 1981).

agement violated the reporting provisions of the Act[2] by failing to amend Lowe Management's investment adviser registration form promptly to disclose Lowe's March 1978 convictions relating to his conduct as an investment adviser (J.A. 67). The Commission also invoked the provisions in Section 203(e) and (f) of the Act that make certain of Lowe's New York convictions a separate basis for administrative sanctions (J.A. 68).

The Commission rejected Lowe's argument that there was no need for sanctions because he and his advisory corporation no longer handled clients' funds or securities, but were then solely providing advice by publication (J.A. 69-71). Rather, the Commission found that even their publishing activities afforded "numerous 'opportunities for dishonesty and self-dealing'" (J.A. 71).

Finding that Lowe's conduct "could hardly be more serious" and reflected a "callous disregard" for the high fiduciary standards required of an investment adviser (J.A. 70-71), the Commission issued an order revoking the registration of Lowe Management as an investment adviser and barring Lowe from association with any investment adviser (J.A. 73). Neither Lowe nor Lowe Management sought judicial review of the Commission's order (Pet. App. A4).[3]

c. Despite the May 11, 1981 Commission order, Lowe continued to publish and distribute through his advisory corporations two investment advisory services—the *Lowe Investment and Financial Letter* (*Lowe Letter*) and the *Lowe Stock Advisory*. In addition, Lowe has solicited subscriptions for a third service—the *Lowe Stock Chart Service* (J.A. 15, 28-29). Lowe has also offered to subscribers of six months or longer a recorded telephone "hotline" service claimed to provide "up-to-the-minute advice" on the market (C.A. App. 153, 161, 191). Pet. App. A5.

The *Lowe Letter* is regarded by its readers as an advisory publication designed to aid them in making investment decisions.[4] The legend on the masthead of the publication reveals its attraction to investors: "Market Timing and Stock Selection for Maximum Profits" (see, *e.g.*, J.A. 78). This publication consists of predictions and forecasts of general trends and developments in securities and other markets, followed by advice about specific securities and other investments (J.A. 78-85; C.A. App. 138-189). It offers advice on the relative desirability of investing in, among other things, stocks, treasury bills and money market funds, and it recommends particular stocks or groups of stocks for purchase or sale. Pet. App. A5-A6.

The *Lowe Letter* has been disseminated to varying numbers of clients, ranging from 3,000 clients for the August 21, 1981 issue, to approximately 19,000 clients for the December 11, 1981 issue, with an average of about 4,500 to 5,000 for all other issues (Pet. App. A5; J.A. 32). As of August 20, 1982, the *Lowe Letter* had approximately 2,408 paid subscribers, with an additional 2,448 persons with expired subscriptions continuing to receive issues (J.A. 31). Subscriptions to the *Lowe Letter*

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[2] Section 204 of the Act, 15 U.S.C. 80b-4, and Rule 204-1(b) thereunder, 17 C.F.R. 275.204-1(b).

[3] Subsequent to the Commission's proceedings, Lowe pleaded guilty in 1982 to two felony counts of theft by deception in the third-degree, in violation of N.J. Stat. Ann. § 2C:20-4 (West 1982) (J.A. 74-76). Lowe had fraudulently misrepresented to two New Jersey banks that certain checks were good and negotiable, when in fact he knew they were worthless. Pet. App. A5.

[4] As one client testified (J.A. 36, 37):

> [The *Lowe Letter*] is an investment advisory service to help people with their investments, to guide them through and select the proper securities for investment.
>
> * * * * *
>
> I subscribed to the letter to receive the advice that I needed for investments.

The *Lowe Letter* "is advertised as a semi-monthly publication, but at least since May 1981, it has appeared only at irregular intervals" (Pet. App. A42-A43).

cost from $39 for one year to $79 for three years (Pet. App. A5; C.A. App. 191).

The Lowe Stock Advisory is an investment advisory service specializing in low-priced stocks (under $20) listed on the American Stock Exchange or the New York Stock Exchange or traded in the over-the-counter market (J.A. 39; C.A. App. 192).[5] Its masthead legend—"Sensible Speculations in Low Priced Stocks"—testifies to its appeal to investors (see, *e.g.*, C.A. App. 193, 198). The *Lowe Stock Advisory* typically contains a brief introductory examination of general market or economic trends followed by specific purchase, sale or hold recommendations for low priced stocks (Pet. App. A6). The *Lowe Stock Advisory*, as of August 20, 1982, had approximately 278 paid subscribers and 397 non-paying readers; each issue has been mailed to between 400 and 700 persons (J.A. 32). Subscriptions cost from $39 for one year to $79 for three years (Pet. App. A6; C.A. App. 232).[6]

2. The Commission brought the present action in the United States District Court for the Eastern District of

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[5] The publication has been distributed on an infrequent, irregular basis. See Pet. App. A43.

[6] The *Lowe Stock Chart Service* is advertised as a service containing "[o]ver ten pages of technical and fundamental indicators" for particular stocks traded on the New York Stock Exchange, on the American Stock Exchange and in the over-the-counter market (C.A. App. 203, 205). The sample charts distributed analyze the trading patterns of selected securities and provide information concerning the projected future earnings for certain corporate issuers (see C.A. App. 202-209). This publication, as in the case of the other Lowe publications, is designed to assist clients in their investment decisions. The *Lowe Stock Chart Service* has solicited subscriptions since late 1980 (J.A. 33, 42), and, as of August 20, 1982, had approximately 44 paid subscribers (J.A. 32), who paid from $33 for five weeks of service to $449 for one year (C.A. App. 203, 206). As of the date of trial no issues of the *Lowe Stock Chart Service*, other than a few sample charts (C.A. App. 204-209), had ever been distributed (J.A. 33). See Pet. App. A6, A43-A44.

New York, seeking an order enjoining Lowe and his three corporations from providing investment advice in violation of the Act's registration provisions, enforcing the Commission's 1981 order, and directing disgorgement of subscription monies received (Pet. App. A45). The district court recognized (*id.* at A42) that, in light of Lowe's past criminal conduct, "[t]he SEC's lack of confidence in Lowe is not without basis," but nevertheless refused to enjoin publication of the advisory letters (*id.* at A41-A67). The court decided that a construction of the Act that would authorize the Commission to deny or revoke the registration of an advisory publisher for past misconduct would constitute an improper prior restraint in violation of the First Amendment (*id.* at A54-A55). It therefore held that the Commission could require publishers of investment advisory services to register, but construed the Act to limit the Commission's authority to revoke an adviser's registration to those advisers who provide their services in person and not through publication (*id.* at A52). Accordingly, the court denied the Commission's request for an injunction against petitioners' publication of investment advice, but granted a limited injunction prohibiting them from rendering personal investment advice (*id.* at A67).[7]

3. The court of appeals reversed the district court's denial of an injunction against publication, holding that the Commission's authority under the Act to revoke the registration of investment advisers extends to publishers of investment advisory services and that this statutory authority does not violate the First or Fifth Amendments (Pet. App. A1-A39).[8]

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[7] The court also enjoined petitioners from providing their advice by individual letter or recorded telephone "hotline" service (Pet. App. A67).

[8] District Judge Brieant, sitting by designation, dissented on grounds similar to those stated by the district court (Pet. App. A23-A29). Judge Van Graafeiland joined Judge Oakes' majority opinion and filed a concurrence (*id.* at A20-A22).

The court of appeals found that Congress, in enacting the Advisers Act, recognized the potential for abuse by publishers of investment advice and clearly intended to regulate such publishers. The court concluded that there was no basis in the statute for the district court's distinction between personal and impersonal investment advice. Pet. App. A8-A11. The court also concluded (*id.* at A11-A13) that Lowe's publications were not within the statutory exclusion for a "bona fide newspaper * * * or financial publication of general and regular circulation." § 202(a)(11)(D), 15 U.S.C. 80b-2(a)(11)(D).

With respect to the First Amendment challenge, the court upheld the Commission's regulation of investment advisory publishers on two independent grounds. The court first held that the challenged provisions constitute valid regulation of commercial activity. Citing *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), in which this Court pointed out that government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," the court concluded that "the provisions of the Investment Advisers Act at issue here are precisely the kind of regulation of commercial activity permissible under the First Amendment" (Pet. App. A15). The court recognized numerous examples of commercial regulation permissible under the First Amendment, including regulation of the transfer of information about securities, corporate proxy statements, price and product information among competitors, and certain labor activities (*ibid.*). It considered the registration of advisory publishers to fall within the government's authority to license professionals and noted that "denial of a professional license for criminal conduct has been a traditional, and perhaps necessary, aspect of this type of regulation" (*id.* at A18-A19).

The court of appeals concluded independently that the registration of investment advisers is a valid restriction on commercial speech. The court reasoned that the concept of commercial speech is not limited to advertising and is broad enough to encompass Lowe's publications. Pet. App. A17.

The court rejected petitioners' claim that barring Lowe from the advisory business was an improper prior restraint, whether the Act is viewed as regulation of a profession or of commercial speech. According to the court, the "regulation of professions is intended to prevent harm to the public before it occurs" and merely punishing Lowe for further violations of the securities laws would "hardly be effective redress for the affected public" (Pet. App. A19). Under the commercial speech analysis, the court, relying on *Friedman* v. *Rogers*, 440 U.S. 1, 15 (1979), concluded that "the potential for deception permits government to ban potentially deceptive commercial speech," and that, "[i]n light of Lowe's history of deceptive, criminal conduct as an investment adviser, his publications may fairly be characterized as potentially deceptive commercial speech" that is not entitled to constitutional immunity from regulation (Pet. App. A19).

Finally, the court of appeals rejected Lowe's argument that the statutory exclusion for a "bona fide newspaper * * * or financial publication of general and regular circulation" (§ 202(a)(11)(D), 15 U.S.C. 80b-2(a)(11)(D)) deprived him of equal protection of the laws. Since "the publication of investment advice is regulable commercial activity," the court reasoned, "such newsletters may be treated differently from other publications" (Pet. App. A15-A16 n.5).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Commission's authority under the Investment Advisers Act to deny or revoke the registration of investment advisory publishers does not violate the First or Fifth Amendments.

I

The Investment Advisers Act is one of several statutes in which Congress sought to prevent recurrence of the serious abuses in the securities markets that contributed to the Great Depression. After extensive study, it was determined that investment advisers, including those who publish their advice in advisory services such as Lowe's, are professionals who have a fiduciary relationship with their clients and who must be regulated in order to protect those clients and the investing public generally. The heart of the regulatory scheme is found in Section 203 of the Act, which requires that investment advisers be registered with the Commission and provides that their registration may be revoked, where necessary to protect the public, on the basis of specified criminal and other misconduct.

All the Commission seeks in this case is to enjoin Lowe's unlicensed practice of the investment advisory profession. Regulation of the professions and of other commercial activity has long been considered within the province of legitimate governmental activity. While such regulation undoubtedly has an effect on speech, that fact does not require application of the full panoply of First Amendment protections, such as the presumption against prior restraints. If it did, governments would be without effective means of engaging in the prophylactic regulation necessary to protect the public from harm.

The Act, like similar professional licensing schemes, is not aimed at suppressing speech. Rather, it is a generally applicable economic regulation. It does not single out the press for special treatment, but treats all advisers alike, whether they provide personal advice or advice through publications. Petitioners concede that prohibiting unlicensed advisers from giving personal investment advice is constitutional. Unless this Court is willing either to invalidate Congress's determination that the publication of advice presents opportunities for abuse similar in magnitude to those presented by personal

advice, or to grant the published written word a special status superior to that of the spoken word, application of the Act to publishers must be upheld.

The commercial speech doctrine is also relevant in this case, which arises in the special context of professional regulation. The communications in question here simply constitute professional advice. They do not relate to political, cultural or philosophical issues, but only to private economic decisionmaking concerning the relative merits of various investments. Whatever the core notion of commercial speech, it would make little sense to afford petitioners' advisory services protection under the First Amendment greater than that to which commercial speech is entitled. The sort of ban on potentially deceptive speech permissible under the commercial speech doctrine is essential for effective regulation of the professions. There is ample justification for prohibiting the publication of investment advice by one with Lowe's criminal record.

II

The Act's exclusion for bona fide newspapers, magazines and financial publications of general circulation does not deprive advisory publishers of the equal protection of the laws. The restrictions in the Act do not infringe fundamental rights and are rationally related to a legitimate governmental interest.

ARGUMENT

I. CONGRESS'S REGULATION OF INVESTMENT ADVISORY PUBLISHERS UNDER THE INVESTMENT ADVISERS ACT OF 1940 IS CONSISTENT WITH THE FIRST AMENDMENT

A. Congress Has Determined That Investment Advisers, Including Those Who Furnish Advice Through Publications, Are Professionals Whose Practice Must Be Regulated In Order To Protect The Public

The Investment Advisers Act of 1940 is premised on Congress's determination that the business of providing investment advice is a professional activity in which abu-

sive practices had harmed both individual clients and the investing public generally. In order to prevent such abuses from recurring, Congress embarked on a modest program of regulation, relying primarily on a requirement that professional investment advisers be registered with the Securities and Exchange Commission, together with a grant of authority to the Commission to deny or revoke the registration of an adviser for criminal or other specified misconduct. An understanding of the Act's provisions and the abuses that prompted their enactment is essential to the resolution of the questions raised by petitioners. See *Virginia State Board of Pharmacy* v. *Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748, 750 (1976).

1. "The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). As the Court recognized, "'[i]t requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry." *Id.* at 186-187, quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963). Congress studied the abuses in the securities industry and took the action it considered necessary to prevent recurrence of a similar financial disaster.

Congressional concern over the publication of investment advice predates passage of the Investment Advisers Act. The Senate hearings on stock exchange practices, which led to the enactment of the Securities Exchange Act of 1934, revealed widespread abuses by publishers of investment advisory services and other financial publications.[9] The Senate reported that "pool operators"—

[9] *Stock Exchange Practices: Hearings on S. Res. 84 Before the Senate Comm. on Banking and Currency*, 72d Cong., 1st Sess. 302, 446-464, 601-602, 672-712 (1932); *Stock Exchange Practices: Hearings on S. Res. 56 and S. Res. 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 5899-5904 (1934).

groups of investors who agreed to trade actively in a single security to manipulate its price[10]—used market letters[11] and investment advisory services[12] to disseminate false information "designed to excite public attention toward the securit[ies]." S. Rep. 1455, 73d Cong., 2d Sess. 41-45 (1934). Other methods used by pool operators to distribute propaganda included "the employment of professional publicity agents; the subsidizing of financial writers; and the distribution of 'tipster sheets' purporting to emanate from reputable financial services and to contain scientific and statistical data concerning the security" (*id.* at 44).[13]

[10] S. Rep. 1455, 73d Cong., 2d Sess. 45 (1934) (S. Rep. 1455).

[11] Market letters that made favorable comments on a particular stock were distributed by a brokerage firm while interested persons at the firm held options on the stock that would increase in value if the price of the stock rose. S. Rep. 1455, *supra*, at 41-43.

[12] A publisher of an advisory service known as the "Stock and Bond Reporter" publicized particular stocks that formed the basis of pool operations in return for substantial blocks of stock from the pool operators. The publisher also employed newspaper writers to write articles publicizing his stocks and hired a person to broadcast over the radio claiming to be a legitimate economist and president of an independent research organization. Between 1928 and 1930, the publisher was involved in 250 pool operations and realized a net profit of half a million dollars. S. Rep. 1455, *supra*, at 44.

[13] The committee report accompanying the Senate draft of the Securities Exchange Act described the type of abuses then present in the industry:

> [I]t was not uncommon for market operators to employ a publicity agent to tout a stock in which they were momentarily interested. In one instance a financial writer on a great New York newspaper was discovered to have been a regular participant in the profits of a freelance trader, without obligation except to publicize the stocks of the trader. Another witness admitted that his business was "financial publicity" and that his articles were published for the purpose of interesting the public in the stock in which he and those who employed him

It was against this background that Congress enacted the Investment Advisers Act. The Act was a product of the Commission's study of the investment company and investment trust industries undertaken pursuant to Section 30 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79z-4. In studying investment companies, the Commission surveyed the field of investment counsel, management and advisory services. S. Rep. 1775, 76th Cong., 3d Sess. 1, 20 (1940) (Senate Report).

In studying the practices of investment advisers prior to passage of the Act, Congress recognized that investment advisers are professionals who should be subject to regulation similar to that of lawyers and accountants. Dwight C. Rose, president of the Investment Counsel Association of America, testified that the relationship between investment advisers and their clients is "inherently a professional one, similar to that involved in the practice of law or accountancy." *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 738 (1940) (Senate Hearings). Senator Wagner, sponsor of the original bill, compared the registration of investment advisers to the licensing of lawyers, real estate brokers, insurance brokers and registered nurses (*ibid.*). Congress was aware, moreover, that a leading investment counsel association had endorsed the view that the "[m]aintenance of high standards of integrity, competence, and practice" was crucial to the advisory profession to keep the profession "free from all forms of abuse." Senate Hearings 723.

Congress also recognized that, as professionals, investment advisers maintain a fiduciary relationship with their clients. See *Capital Gains Research Bureau, Inc.*, 375

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were interested, thereby causing the market value of the stock to increase; and for his work he was paid by calls and options. Still other cases were observed where persons were employed to broadcast over the radio, ostensibly as economists tendering gratuitous advice, but in reality as publicity agents of stock-exchange firms.

S. Rep. 792, 73d Cong., 2d Sess. 8 (1934).

U.S. at 191, 194. It realized that the relationship between an investment adviser and his client was one "where fraud can wreak havoc." Senate Hearings 745. See *Marketlines, Inc.* v. *SEC*, 384 F.2d 264, 267 (2d Cir. 1967) (per curiam), cert. denied, 390 U.S. 947 (1968) (affirming revocation of an advisory publisher's registration). Accordingly, Congress sought in the Act to protect the public against abuse by unscrupulous advisers of their position as trusted fiduciaries. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 190-195.

Significantly, concern in regulating the investment advisory profession was not limited to those advisers who provided personal advice to individual clients, but extended to those who advised their clients through publications as well. Indeed, the danger that large numbers of people will be misled to their detriment or that the investing public generally will be harmed is considerably greater when advice is broadly disseminated through publication. Many of the abuses of which Congress was aware and that formed the basis for its decision to regulate the profession were the product of unethical advisory publishers.

National regulation of investment advisory publishers was deemed necessary because of "their potential influence on security markets and the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors." [14] Thus, Congress was concerned with two

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[14] Senate Report 21. These "dangerous potentialities" were outlined in a memorandum submitted to Congress by the Commission:

> The reason for considering these generalized investment services in relation to possible regulation, is to be found in the greatly varying types of news, facts, and conjectures that are circulated. Criticism is also prevalent of advertising policies which sometimes involve great overemphasis of the value of the service supplied and of the profits which can be expected from the use of such services. Then, too, question [sic] may arise as to the good faith of some of the less reputable of these generalized investment services.

Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency,

types of injury: harm to investors trading generally in the market,[15] and direct harm to individual subscribers caused by the investment advice they received. A memorandum submitted to Congress by the Commission emphasized the potential abuses arising from the business of publishing investment advice, particularly when the persons involved are lacking in integrity:

> Often * * * they are not honest but open to suspicion of willingly lending themselves to the use of stock market promoters and manipulators who seek to influence the course of security prices through the use of propaganda. * * * The worst forms of tipster sheet exist for no other reason than to lure the investor and gambler to their financial ruin.[16]

Congressional concern with the segment of the profession involving advisory publications was amply demonstrated at the hearings and in the committee reports. The legislation was intended to cover all "investment advisers," a profession found to "encompass[] that broad category ranging from people who are engaged in the profession of furnishing disinterested, impartial advice to a certain economic stratum of our population to the other extreme, individuals engaged in running tipster organizations, or sending through the mails stock market letters." *Senate Hearings* 47; see also Senate Report 21; *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 3d Sess.

76th Cong., 3d Sess. 1008 (1940) (Senate Hearings) (Memorandum entitled "Statutory Regulation of Investment Counselors," prepared by Research Department, Illinois Legislative Council).

[15] Investment advisory publishers can have a significant impact on trading in the stock market. In *Capital Gains Research Bureau, Inc.*, 375 U.S. at 183, for example, this Court noted that on six different occasions, an increase in price and trading volume of a security resulted within days of the publication of a favorable report on that security.

[16] Senate Hearings 1008, quoting Twentieth Century Fund, Inc., *The Security Markets* 692 (1935).

87 (1940). Indeed, coverage encompassing advisory publishers is made clear on the face of the statute. In its statement of findings in Section 201, 15 U.S.C. 80b-1, Congress found that the "advice, counsel, *publications*, writings, analyses, and reports" of investment advisers "occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy" (emphasis supplied). In order to provide protection against injurious practices of publishers of investment advice, the term "investment adviser" was defined in the Act to include any person who "engages in the business of advising others, either directly or *through publications* or writings, as to the value of securities or as to the advisability of investing in * * * securities * * *." § 202(a)(11), 15 U.S.C. 80b-2(a)(11) (emphasis supplied).

In *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*, the Court thoroughly reviewed the legislative history of the Act. It found that Congress intended to subject publishers of investment advisory services to regulation, and to recognize under federal law the fiduciary relationship that exists between investment advisory publishers and their clients. 375 U.S. at 187 n.15, 191, 194. The Court held that the Commission could obtain an injunction requiring an investment advisory publisher to disclose to his clients his practice of "scalping," that is, purchasing shares of a security before recommending it and then selling them at a profit immediately following the recommendation. In so holding, the Court relied on Congress's intent to regulate the fiduciary relationship between investment adviser and client (*id.* at 191-195). The Court did not suggest that a different standard governs those who provide investment advice to clients through publication; indeed, its holding demonstrates precisely the opposite.[17]

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[17] The Act excludes from the definition of an "investment adviser" any "bona fide newspaper, news magazine or business or financial publication of general and regular circulation." § 202(a)(11)(D),

2. Despite the seriousness of the abuses brought to Congress's attention, the actual scheme of regulation it

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15 U.S.C. 80b-2(a)(11)(D). Petitioners do not raise before this Court the argument rejected by the court of appeals (Pet. App. A11-A13) that Lowe's publications come within this exclusion. Amicus American Civil Liberties Union (ACLU), however, does raise this point (Br. 2-10). Its argument is without merit. The ACLU omits any discussion of the statutory language, basing its argument solely on portions of the legislative history. But petitioners cannot come within the statutory terms: Lowe's publications are not newspapers or magazines (see J.A. 78-85), nor are they of general circulation. This being so, there is no cause to look beyond the statutory language to its legislative history. *E.g.*, *United States* v. *Clark*, 454 U.S. 555, 560 (1982). Moreover, the Commission's interpretation of the exclusion (see page 50, *infra*) not to encompass publications such as petitioners' is entitled to substantial deference. *E.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 588 (1982).

A number of other factors also compel the conclusion that Lowe's publications are not within the statutory exemption. The ACLU's argument would read Congress's express inclusion of advisers who provide advice "through publications" (§ 202(a)(11), 15 U.S.C. 80b-2(a)(11)) out of the Act: if Lowe's publications, which are purchased for no other reason than to obtain investment advice, are not within the coverage of the Act, no publication could be. Moreover, Congress had before it abundant evidence of abuses by publishers, not merely by personal advisers (see pages 12-13, 15-16, *supra*). It expressly found that "publications" of investment advisers were cause for regulatory action (§ 201, 15 U.S.C. 80b-1). Regulation of publications such as Lowe's is fully consistent with the purpose of the Act. See *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970). Significantly, this Court in *Capital Gains Research Bureau, Inc.* applied the Act to the publisher of a monthly report sent to 5,000 subscribers, and approved an injunction requiring certain disclosures by the publisher; there is no indication in the Court's opinion that the investment adviser there also provided personal advice (375 U.S. at 182-183). Had application of the Act to an advisory publisher in *Capital Gains Research Bureau, Inc.* rested on a misinterpretation of the exclusion, Congress would presumably have rectified it when it passed substantial amendments to the Act in 1970 and again in 1975, 8 and 13 years after the Court's decision. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-386 (1983); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

developed for investment advisers was not extensive. Congress did not "even remotely presume to undertake to pass upon their qualifications."[18] Rather than limit access to the advisory profession to persons meeting certain educational standards or financial responsibility requirements (as Congress has done, for example, under the Securities Exchange Act in the case of broker-dealers[19]), Congress required only that the applicant not have engaged in certain specified misconduct involving securities. § 203(e), 15 U.S.C. 80b-3(e). But that disqualification provision was viewed by Congress as vitally important. The need to prevent such persons from engaging in the profession was emphasized in the "declaration of policy" contained in the original bill, which stated that

> the national public interest and the interest of investors are adversely affected—* * * when persons of proven lack of integrity in financial matters are permitted to engage in business as investment advisers * * *.

S. 3580, 76th Cong., 3d Sess. § 202 (1940).[20] This concern was embodied in what is now Section 203(e) of the Act, 15 U.S.C. 80b-3(e), which grants the Commission authority to deny or revoke registration on the basis of certain types of prior misconduct.[21]

As explained by David Schenker, Chief Counsel of the Commission's Investment Trust Study, the Act "merely requires registration, and seeks to prevent frauds and

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[18] Senate Hearings 50.

[19] See Section 15(b)(7) and (c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(7) and (c)(3).

[20] Although this "declaration" was deleted from the final version of the Act, the Court in *Capital Gains Research Bureau, Inc.*, explained (375 U.S. at 191 n.34) that it was omitted *not* "because Congress had concluded that the abuses had not occurred * * *," but because Congress wanted "to avoid condemning an entire profession (which depends for its success on continued public confidence) for the acts of a few."

[21] This authority was in Section 203(d) of the original Act (54 Stat. 851).

keep out jailbirds and security racketeers."[22] Robert Healy, then Commissioner of the SEC, stated that the real intent of the Act was "to see to it that men with this kind of [criminal] record cannot go into the business of being investment advisers."[23] This was accomplished through the registration provisions, the heart of the Act, by requiring advisers "to register with the Commission, which is empowered to deny or revoke the registration * * * of individuals convicted or enjoined by the courts for securities fraud." H.R. Rep. 2639, 76th Cong., 3d Sess. 28 (1940). Thus, the Act "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship.'" *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 191, quoting 2 L. Loss, *Securities Regulation* 1412 (2d ed. 1961).

Congress reaffirmed its concern with the potential for harm if persons guilty of misconduct involving financial matters were permitted to engage in the investment advisory business in 1960 when it amended Section 203(d) of the Act to expand the grounds for denial or revocation of registration. Pub. L. No. 86-750, § 3(b), 74 Stat. 885.[24]

> The committee is aware that the opportunity to advise others how to invest their money is becoming

[22] Senate Hearings 995.

[23] *Id.* at 757.

[24] The abuses surrounding publication of investment advice did not end with passage of the Act. As one former senior Commission official noted in 1959:

> The publishers of miscellaneous reports and letters present a particularly troublesome problem. In addition to many legitimate services, there appear to be some eccentrics, some sensationalists who promise miracles in the market which they can hardly deliver, and some out and out tipsters. Much of the Commission's enforcement work under the act has been devoted to the latter element.

Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 Geo. Wash. L. Rev. 214, 249 (1959) (citations omitted); see also *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 181, 183 (describing the recurrent abusive practice by unethical advisory publishers known as "scalping").

> increasingly popular and lucrative. There are now over 1,800 advisers registered under the act. The committee is convinced that under the present law increasing opportunities exist for unscrupulous persons to practice as advisers. Therefore, new grounds for denying entrance into the field or revoking the registration of an adviser have been added.

S. Rep. 1760, 86th Cong., 2d Sess. 2 (1960). The 1960 amendment to Section 203(d) (74 Stat. 885) was intended to make it possible for the Commission to "exclude any person who has been convicted of a financial type crime,"[25] such as embezzlement, fraudulent conversion or misappropriation of funds or securities, or who has been convicted of mail fraud, or who is found by the Commission to have willfully violated certain of the federal securities laws.[26] These provisions were again amended in 1975[27] to conform to similar registration provisions for broker-dealers in the Securities Exchange Act and to expand further the grounds for denial or revocation of registration. § 203(c)(2) and (e), 15 U.S.C. 80b-3(c)(2) and (e).[28]

Finally, it should be emphasized that denial or revocation of an investment adviser's registration is neither required nor automatic upon a finding that the person has engaged in conduct or been convicted of a crime listed in the statute as a ground for disqualification. Rather, the Commission is authorized to impose sanctions only when it finds, after a hearing, that the sanctions are "in the public interest" (§ 203(e), 15 U.S.C. 80b-3(e)).[29]

[25] *Securities Act Amendments, 1959: Hearing Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 117 (1959).

[26] Pub. L. No. 86-750, § 3(b), 74 Stat. 885.

[27] Pub. L. No. 94-29, § 29, 89 Stat. 167.

[28] Among the grounds added by the 1975 amendments were conviction for specified crimes involving dishonesty and theft or any crime arising out of the business of a bank, insurance company or fiduciary.

[29] Mr. Schenker explained that even though an applicant had engaged in securities fraud, the disqualification would not be automatic:

Moreover, a wide range of sanctions are available, including suspension of registration and the placing of limitations on an adviser's professional activities (*ibid.*). The Commission may therefore tailor an appropriate sanction to the danger to the public presented by a particular person's practice of the investment advisory profession. See generally *Marketlines, Inc.* v. *SEC*, 384 F.2d at 267. Any sanction imposed by the Commission is subject to review in the courts of appeals (Section 213 of the Act, 15 U.S.C. 80b-13).[30]

B. Persons Demonstrating A Lack Of Integrity In Financial Matters May Be Prohibited From Engaging In The Practice Of The Investment Advisory Profession, Including The Publication Of Investment Advice

It is plainly within the government's power to regulate the practice of professions in order to protect the public. That authority encompasses both the power to license

> If they have been convicted in connection with a securities fraud, * * * we have the right—we are not under duty—after considering all the factors, if we think that the public interest would be injured, to say that "We will not register you."

Senate Hearings 50.

[30] Petitioners did not take advantage of their right to seek review in the court of appeals of the Commission's order in the administrative proceedings in which Lowe Management's registration was revoked (see page 4, *supra*); nor do they now contend that the sanction imposed, if constitutional, was excessive in light of Lowe's past criminal activities.

Petitioners' argument (Br. 19-20) that the Act vests an impermissible degree of discretion in the Commission is insubstantial. Revocations are authorized only where one of the statutorily prescribed disqualifications is present. The requirement that the Commission also determine that revocation is in the "public interest"—a requirement that provides additional protection to those in petitioners' position—does not grant the Commission an undue quantum of discretion. See, *e.g.*, *NAACP* v. *Federal Power Comm'n*, 425 U.S. 662, 669 (1976); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216 (1943); *New York Central Securities Corp* v. *United States*, 287 U.S. 12, 24-25 (1932).

those who would engage in a profession and, as a necessary corollary, the power to forbid its practice by those who are not licensed. Despite the indirect effect such regulation may have upon speech, it has, with good reason, not been thought to amount to a prior restraint or otherwise to violate the First Amendment.

The registration provisions of the Investment Advisers Act at issue protect the public by regulating commercial activity—the furnishing of professional advice with respect to trading in securities. The Act is comparable to the regulation of other professions where, as here, licensing schemes serve important public interests. Publishers are not singled out for special burdens, but rather are encompassed within a single scheme applicable generally to the investment advisory profession. Lowe's advisory activities have been enjoined as a prophylactic measure to protect the public from the potential for harm arising from professional practice by one with his criminal background. His position is no different from that of a lawyer, doctor or other professional who continues to practice notwithstanding the revocation of his license.

Petitioners admit (Br. 29) that personal investment advice may be licensed and enjoined. Their arguments ultimately amount to nothing more than a disagreement with Congress over whether the potential for harm resulting from the publication of investment advice is sufficiently great that it should be included within the regulated profession. There is no basis for the Court to invalidate Congress's determination.

1. *As a means of serving important public interests, including the regulation of commercial activity, the government may license and set standards for admission to the professions and regulate their practice, notwithstanding an indirect effect on speech*

a. The government may properly regulate commercial activities, notwithstanding an indirect effect on speech. In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, this Court upheld disciplinary ac-

tion against an attorney for engaging in prohibited in-person solicitation of clients. The Court held (436 U.S at 456-457) that the government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," and pointed (*id.* at 456) to

> [n]umerous examples * * * of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

See also *National Labor Relations Board* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616-619 (1980) (ban on secondary picketing); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696-699 (1978) (injunction against publication of canon of ethics of professional engineers to remedy antitrust violation). In each of these cases, legislation aimed at regulating commercial activity was upheld even though the regulation had an indirect impact on speech.

As Justice Black stated for a unanimous Court in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id.* at 502, quoted in *Ohralik*, 436 U.S. at 456. Investment advisers, like other professionals and other persons engaging in commercial activity, can claim no First Amendment immunity from general commercial regulations not directed at suppressing speech.

b. This Court has consistently found that licensing of the professions clearly falls within the scope of legitimate

governmental regulation. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 460; *Watson* v. *Maryland*, 218 U.S. 173, 177-178 (1910) ("regulations of a particular trade or business essential to the public health and safety are within the legislative capacity of the State * * * unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily"); *Dent* v. *West Virginia*, 129 U.S. 114, 121-123 (1889). The Court has recognized that the government has a compelling interest in the practice of professions and that, as part of its "power to protect the public health, safety and other valid interests [it] ha[s] broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). In *Ohralik*, for example, the Court affirmed an order suspending an attorney indefinitely from the practice of law despite his First Amendment challenge, stating that the government "bears a special responsibility for maintaining standards among members of the licensed professions" (436 U.S. at 460).

The government's authority to regulate the professions plainly includes the power to deny or revoke a professional license for criminal conduct demonstrating that the person is unfit to practice the profession. *Barsky* v. *Board of Regents*, 347 U.S. 442, 451 (1954).[31] It is the

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[31] Should the Court conclude, contrary to our submission, that the revocation and bar provisions of the Act are unconstitutional, it should at least uphold, as did the district court (Pet. App. A66), the requirement that publishers of investment advice register with the Commission. See generally *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50, 62 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976); *United States* v. *Harriss*, 347 U.S. 612 (1954). And whatever relief the Court determines is necessary, it should not wholly exempt advisory publishers from the coverage of the Act—such a course would exempt publishers from the operation of the antifraud provisions (§ 206, 15 U.S.C. 80b-6), which neither petitioners nor amici claim are unconstitutional as applied to publishers. Petitioners seek (Br. 46-47) only a determination that the *revocation and bar* provisions (§ 203(e) and (f), 15 U.S.C. 80b-3(e) and (f)) are invalid as applied to publishers.

essence of professional licensing that injury be prevented by prohibiting unauthorized practice rather than merely redressed, if at all, after the harm has occurred. While speech may be used in the course of practicing a profession, a disciplinary scheme grounded in the protection of the public and not triggered by an applicant's exercise of his First Amendment rights does not amount to an unconstitutional prior restraint. There is, as the Court has noted, no First Amendment right to practice a particular profession. *Board of Regents* v. *Roth*, 408 U.S. 564, 575 n.14 (1972).

While the licensing of professionals may by its very nature be viewed as a prior restraint on speech, the doctrine that such restraints bear "a heavy presumption against [their] constitutional validity" [32] is simply not applicable in this area, for a number of related reasons. First, professional licensing schemes are not aimed at suppressing speech, but at ensuring that those who provide advice or services on which the public must rely are qualified to do so. See *Barsky* v. *Board of Regents, supra.* That speech may be affected indirectly does not turn an otherwise valid regulatory program into an unconstitutional prior restraint. Lowe Management's registration, for example, was not revoked in response to speech with which the government disagreed or in order to suppress such speech, but on the basis of Lowe's prior criminal conduct. Cf. *Connick* v. *Myers*, 461 U.S. 138, 142 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

Moreover, the principal objection to prior restraints—that speech will be suppressed before it can be ascertained with relative certainty that it is unprotected by the First Amendment [33]—is wholly inapplicable to the professional licensing context. The Investment Advisers Act, like similar professional licensing schemes, does not seek

[32] *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam).

[33] See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

to censor any particular message based on its harmful impact, but to ensure that only persons of integrity are providing the professional service in question.[34] It is only in this way that the public may adequately be protected. This Court has recognized as much in upholding against First Amendment attack regulatory schemes that could be characterized as prior restraints. *Ohralik* v. *Ohio State Bar Ass'n, supra*; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (prohibition on use of mails in order to prevent fraud).

2. *Petitioners may constitutionally be prohibited from engaging in the unauthorized practice of the investment advisory profession*

a. The regulation of investment advisers established by Congress in the Act falls well within its power to license members of a profession engaged in commercial activity with an effect on interstate commerce. As we have demonstrated (pages 11-22, *supra*), the Investment Advisers Act was part of a series of statutes designed to eliminate abuses in the securities markets. In determining to regulate investment advisers, Congress was legitimately concerned with the frauds and other abuses perpetrated by advisers in the past, and concluded that regulation of the profession was necessary to prevent a recurrence of those abuses and the financial ruin experienced by the nation following the stock market crash in 1929. Accordingly, it decided to require the registration, with certain exceptions, of those persons who, for compensation, engage in the profession of advising others "as to the value of securities or as to the advisability of in-

[34] *Freedman* v. *Maryland*, 380 U.S. 51 (1961), relied on by petitioners (Br. 20-21), is therefore inapposite. Petitioners received the benefit of a hearing before the Commission took action, and had the opportunity to appeal to the court of appeals (§ 213(a), 15 U.S.C. 80b-13(a)). Because the Commission's order did not depend on any particular communications made by petitioners but only on Lowe's status as one convicted of crimes listed in the Act—a status Lowe does not contest—no additional procedures were required for an assessment of those communications.

vesting in, purchasing or selling securities." § 202(a)(11), 15 U.S.C. 80b-2(a)(11).

There can be no doubt that regulation of commercial activity related to the securities markets, including that undertaken in the Investment Advisers Act, is precisely the kind of regulation that is permissible under the First Amendment. The government's interest in ensuring the integrity of the securities markets is wholly " 'unrelated to the suppression of free expression.' " *Members of the City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984) slip op. 14, quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).[35] The Act applies whether advice is given "directly" or "through publications or writings" (§ 202(a)(11), 15 U.S.C. 80b-2(a)(11)). Although this particular case involves an advisory publisher, the Act applies to all investment advisers whether they give their advice in person, over the telephone, through personal letter or through publications of wider circulation. In fact, the Act also applies to persons who render their advice through the exercise of discretionary control over the investment of their clients' funds. Thus, its coverage does not turn on the presence of speech, or on the form of that speech, but on the rendering of professional advice to a client with respect to the client's purchase and sale of securities—a commercial activity "in which speech is an essential but subordinate component." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 457.[36]

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[35] For that reason, this Court in *Ohralik* (436 U.S. at 456) could point to the "exchange of information about securities" at issue in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), which involved a press release by a corporation about a significant corporate development (401 F.2d at 845-846), and the dissemination of corporate proxy statements at issue in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), as commercial activity subject to federal regulation, despite the clear impact on speech of such regulation. Lowe's investment advisory publications are subject to the scheme of federal securities regulation to the same extent.

[36] This case is wholly unlike *In re Primus*, 436 U.S. 412 (1978), in which professional disciplinary action infringed on protected political expression. See pages 40-42, *infra*. Rather, it is controlled by *Ohralik*, decided the same day as *Primus*: Lowe's asserted "speech" interest is merely in practicing his profession. This is not sufficient to outweigh the strong public interest in preventing the harm that could result.

The securities laws, including the Investment Advisers Act, are broad prophylactic measures intended to prevent harm to the investing public. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976). A necessary element of this type of regulation is the ability to preclude persons of proven lack of integrity in financial matters from engaging in the profession. Congress's conclusion that investment advisers must meet a high standard of character in order to protect the unsuspecting public is reflected in Section 203(e) of the Act, which authorizes the Commission to deny or revoke the registration of investment advisers on the basis of certain types of prior misconduct (see pages 19-21, *supra*).

The justification for such a system of regulation is readily apparent: after-the-fact sanctions against offenders would be wholly inadequate. For example, when an advisory service has improperly touted a stock and artificially inflated its price, the numerous investors who have relied on the recommendation and are seriously injured when the price subsequently collapses may be without effective redress for their trading losses (see Pet. App. A49). Moreover, investors generally, and ultimately the public as a whole, are harmed by the movement of resources in response to artificial price signals. As in other professions, prophylactic regulation is necessary to provide adequate protection to the public, particularly in light of the fiduciary relationship between investment advisers and their clients. See generally *Halsted* v. *SEC*, 182 F.2d 660, 668 (D.C. Cir.), cert. denied, 340 U.S. 834 (1950). This Court has therefore affirmed professional regulation that has an impact on speech even in the absence of actual fraudulent conduct in the particular case. *Ohralik* v. *Ohio State Bar Ass'n*, *supra*.

Lower courts have recognized the public interest in denying unfit persons access to the investment advisory profession, "an occupation which can cause havoc unless engaged in by those with appropriate background and standards." *Marketlines, Inc.* v. *SEC*, 384 F.2d at 267.[37] In that case, the court of appeals affirmed a Commission order revoking the registration of an investment advisory publisher, reasoning that the fact that the publisher "was found guilty of various crimes * * * is quite relevant to a determination as to whether it is in the public interest for him to continue as an investment adviser" (*ibid.*). Cf. *SEC* v. *Suter*, 732 F.2d 1294 (7th Cir. 1984).

In a closely analogous situation, the court in *Savage* v. *CFTC*, 548 F.2d 192 (7th Cir. 1977), rejected a First Amendment challenge to the Commodity Futures Trading Commission's denial of registration of a publisher of a weekly commodities newsletter. The CFTC had denied registration on the ground that the applicant's past violations of the federal securities laws demonstrated his unfitness to act as an adviser. The court of appeals viewed the statutory authorization to deny or revoke the registration of advisory publishers on the basis of past misconduct as reflecting a "legislative conclusion that trading advisors must meet a high standard of character in order to protect unsuspecting traders" (*id.* at 197).

[37] Petitioners cite (Br. 18) a number of cases for the proposition that the states may not revoke the license of a bookstore or movie theater for prior criminal activity. See, *e.g.*, *Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980). These cases are inapposite because they arise outside the context of the regulation of a profession, where this Court has long recognized that the government's right to regulate clearly includes the power to deny or revoke a professional license for criminal conduct. *Barsky* v. *Board of Regents*, 347 U.S. at 451. The fiduciary relationship between an investment adviser and his client is far closer, and carries a far greater potential for harm, than the relation of a theater or bookstore owner to his customers. The relationship of trust and confidence inherent in the advisory relationship enhances the opportunity for fraud and overreaching by the adviser. Thus, the Act's provisions, designed to ensure the adviser's trustworthiness and honesty, are of critical importance.

The court in *Savage* rejected the publisher's contention that denial of registration was an unconstitutional prior restraint, reasoning that Congress legitimately determined that the most appropriate means of preventing harm to the public was to preclude dishonest persons from engaging in the profession, not to impose sanctions after the harm has occurred (*ibid.*):

> At issue here is not the worth or accuracy of Savage's publication * * *. He might well have advised his clients with skill as to what commodities to buy or sell. But Congress was interested in the character of the adviser and publisher—not his advice or publication—and in its desire to protect the public it had a right to evince this interest.
>
> In appraising Savage's contentions, we must be mindful of a Congressional purpose, clearly evidenced since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices.

b. Stripped to its essentials, petitioners' argument—and that of their supporting amici—is that the First Amendment grants Lowe the right to engage in the unauthorized practice of giving investment advice through publication, notwithstanding the revocation of his professional license for prior criminal conduct. They respond[38] in two ways to the argument that investment advisers are professionals who may be licensed. First, it is suggested that publishers of investment advice should not be regarded as professionals even if personal advisers are. Second, it is suggested that publishers of written material, even if professional advisers, are entitled to special constitutional protection denied personal advisers. Neither point has merit.

Petitioners admit (Br. 29) that "personal investment advisers who give personal advice to individual clients

[38] See Pet. Br. 25-29; Reporters Committee for Freedom of the Press, et al. (RCFP) Br. 16-20; ACLU Br. 15-18; Association of American Publishers, Inc. (AAP) Br. 12-14; AFL-CIO Br. 10-15.

may be licensed as professionals and their licenses may be revoked for misconduct."[39] They would distinguish the publication of investment advice by relying on cases holding that the publication of legal materials does not constitute the practice of law. See, *e.g.*, *New York County Lawyers' Ass'n* v. *Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967), adopting the dissenting opinion of the Appellate Division, 28 A.D.2d 161, 283 N.Y.S. 2d 984 (1967). This reliance is misplaced. Congress has determined, and this Court has recognized,[40] that a *fiduciary relationship* exists between publishers of investment advice and their clients, and that the dangers arising from the unregulated furnishing of advice through publication are sufficiently great to justify government action (see pages 15-17, *supra*). While the practice of law has historically been characterized by personal advice,[41] the investment advisory profession has not. As we have demonstrated, Congress studied the investment advisory profession in 1940 and found that the profession includes both types of advisers. Based on its findings, it determined to eliminate the abuses associated with investment advisory publishers as well as with personal advisers.[42] Neither

[39] Amici ACLU (Br. 16) and the AFL-CIO (Br. 13) expressly agree. The logic of the arguments of the other amici compels a similar concession.

[40] *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 191, 194.

[41] The New York Court of Appeals in *Dacey* held that the publication of a book entitled *How to Avoid Probate!* did not constitute the practice of law. The opinion adopted by the court, however, turned on the particular nature of the legal profession, not on any broad determination that no profession can encompass publication. That opinion reasoned (283 N.Y.S.2d at 998; emphasis added):

> There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of *legal practice*—the representation and the advising of a particular person in a particular situation.

[42] Indeed, had the New York State legislature reasonably found similar abuses in the publication of legal advice and acted to bring

petitioners nor amici point to any facts that would justify this Court's invalidation of that legislative determination.[43]

Petitioners seek to bolster their argument by contending that their publications cannot be viewed as regulable professional or commercial activity in which speech is a "subordinate component" because publishing written materials "is the *only* activity in which they are engaged" (Br. 28; emphasis in original). But the Act regulates the furnishing of investment advice regardless of the medium; it encompasses pure conduct where advice is given through the management of a client's funds. And many professions, including the practice of law, involve only or primarily speech. Petitioners' argument sweeps

such activities within its regulation of the legal profession, the court in *Dacey* presumably would have upheld such regulation under the First Amendment. There the court stated (283 N.Y.S.2d at 1000):

> Of course if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right would be subordinated for the common good and the protection of the whole.

[43] Our argument that licensing provisions are permissible in the context of the regulation of professional activity is not, as amicus AAP suggests (Br. 13-14), simply a "bootstrap operation." The determination that the publication of investment advice constitutes practice of the profession was made by Congress on the basis of the history of unethical practices in which publishers had engaged to the detriment of investors and the public. It is on this determination that our argument rests, not on a bare use of labels.

AAP also argues (Br. 20-21) that the Commission's interpretation of the Act is impermissibly broad because it could require registration of authors and publishers of books. This argument is irrelevant to the regulation of Lowe's newsletters. In any event, AAP misconstrues SEC Release No. IA-563, on which it relies. The release provides publishers and authors an explicit safe harbor from regulation; it does not require registration of all those whose publications fall outside its terms. To the contrary, only those who fall outside the safe harbor and are found, on an individual basis, to come within the statutory definition of an investment adviser would be subject to the Act.

much too broadly: it would require the invalidation of a wide variety of licensing schemes whose necessity is undoubted and whose propriety has gone unquestioned. There is no principled distinction between Lowe and the disbarred lawyer who asserts a First Amendment right to advise clients and file briefs and present oral argument on their behalf. The states' ability to license lawyers who limit their practice to the giving of advice,[44] for example, would, therefore become constitutionally vulnerable. Moreover, because an investment adviser who provides only personal advice must do so through speech, he could claim, on petitioners' theory, the same immunity from regulation as is contended publishers enjoy. Such a result is at odds with their concession that personal advisers may be regulated. Finally, the compelling interests in protecting the public from harm that prompted Congress to regulate the profession and that form the basis for the regulation of other professions justify such licensing schemes regardless of the degree to which the bulk of any particular profession's activities consist of speech. As this Court has stated:

> "[T]o say that the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting). It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.

Members of the City Council v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 13.

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[44] Many lawyers provide advice in a manner quite similar to an investment adviser's use of newsletters: they regularly distribute to several clients advice based on recent developments in a particular legal area, without tailoring the advice to each client's individual needs. This constitutes the practice of law, and as such plainly falls within the sort of activity that could be enjoined were the attorney disbarred.

Petitioners are not entitled to any special First Amendment privilege simply because they provide published rather than personal advice. If Lowe can be subject to government regulation when he recommends securities to one client, as he admits (Br. 29), he may be subject to regulation when he sends his recommendations by publication to 100 clients or 1,000 clients. As Justice Harlan noted for a plurality of the Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967) (citations and footnotes omitted):

> A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws * * *." Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not "unconditional."

This Court has emphasized that "the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and Federal Government can subject newspapers to generally applicable economic regulation without creating constitutional problems." *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983).[45] The statute must not, however, single out the press for special treatment and thereby place an undue burden on the freedom of the press. See *id.* at 582-583 (tax on printing materials);

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[45] See, *e.g.*, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969) (antitrust laws); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951) (same); *Breard* v. *Alexandria*, 341 U.S. 622 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-193 (1946) (Fair Labor Standards Act); *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946) (same); *Associated Press* v. *United States*, 326 U.S. 1, 6-7, 19-20 (1945) (antitrust laws); *Associated Press* v. *NLRB*, 301 U.S. 103, 132-133 (1937) (National Labor Relations Act); *SEC* v. *McGoff*, 647 F.2d 185, 190 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (Securities Exchange Act); *Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) (Securities Exchange Act); see also *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (enforcement of subpoenas).

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) (licensing tax on publishers unconstitutional).

The Investment Advisers Act does not single out the press, but instead requires registration of all persons who engage in the business of rendering investment advice "directly" or "through publications or writings." Thus, the Act is not, as petitioners contend (Br. 16), a "[l]icensing of the press." It applies to all investment advisers whether they give their advice in person or through publications. In fact, the Act primarily affects the rendering of personal investment advice. Of the more than 9,000 registered investment advisers, only about 500 give investment advice solely through periodic publications. This is no reason for exempting all advisory publishers, a substantial portion of whom also give personal advice. But it does show that the Act is a "generally applicable economic regulation[]" that does not single out the press for discriminatory treatment. *Minneapolis Star & Tribune Co.*, 460 U.S. at 581.[46] The relevant distinction is not between personal advisers and those who publish, but between advisers who are fit to practice the profession and those who, because of criminal misconduct, are not.

c. Petitioners also argue (Br. 37-38)[47] that the Act's regulation is excessive because disclosure of Lowe's criminal conduct would be a sufficiently effective method of regulation. In other areas of professional regulation, however, the government has not been limited to disclosure mechanisms to ensure the integrity of the profession. Surely a lawyer who misappropriated his client's funds has no constitutional right to continue engaging in the practice of law so long as he discloses his misdeeds. Indeed, in *Virginia State Board of Pharmacy* v. *Virginia Consumers Council, Inc.*, 425 U.S. 748 (1976), the Court

[46] The exclusion for bona fide newspapers of general circulation in Section 202(a)(11) of the Act renders it unnecessary for this Court to determine whether the Act's provisions may constitutionally be applied to ordinary newspapers that publish investment advice.

[47] See also ACLU Br. 18; AAP Br. 14-18.

struck down limitations on advertising because the asserted state interest—preserving professional standards—was more directly served by setting standards and revoking the licenses of persons guilty of professional dereliction (425 U.S. at 768-769). But such standards are precisely the regulatory tools petitioners would deny Congress and the Commission with respect to the investment advisory profession.

The regulatory framework envisioned by petitioners (Br. 39), in which dishonest persons would be allowed to continue to practice their profession so long as they disclosed their prior convictions, would not only be unprecedented but unworkable as well. There is no guarantee that the required disclosures would in fact be made. Indeed, Lowe's past violations of the Commission's disclosure rules (see page 4, *supra*) and of the clear prohibitions against misleading his clients and misappropriating their funds amply demonstrate that he may well continue to violate disclosure requirements if allowed to remain in the profession.[48] It is unrealistic to expect the Commission to be able to keep past wrongdoers under surveillance to ensure that they do not engage in future misconduct. *SEC* v. *Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); see also *Mitchell* v. *Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962); *SEC* v. *Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). This is particularly true where the dishonest individuals, such as Lowe, remain in a profession involving a fiduciary relationship that presents the opportunity to inflict serious harm on their clients. No matter how extensive the statutory disclosure requirements, there can be no adequate assurance that dishonest publishers will refrain from using their influence over investors for their personal gain and to their clients' ruin.

[48] Contrary to petitioners' contention (Br. 18; see also AAP Br. 11), the Commission is not required to prove that any of Lowe's published advice is fraudulent. The basis for professional regulation is the prevention of future harm to the public. Lowe's past frauds in connection with his advisory business demonstrate his unfitness and the likelihood that he will use his publications to resume his fraudulent practices.

d. Petitioners, joined by amici,[49] argue (Br. 18, 21) that the injunction authorized by the court of appeals to enforce the registration provisions of the Act would operate as an impermissible prior restraint. In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973), however, this Court recognized that "it has never been held that all injunctions [against speech] are impermissible." The injunction forbidding practice of the profession by an unregistered adviser is simply the enforcement mechanism necessary to make the regulatory program effective. It is no different in any relevant respect from an injunction against the continuing practice of law without a license.

The injunction endorsed by the court of appeals would merely enjoin Lowe from rendering investment advice while not registered with the Commission.[50] As was the case in *Pittsburgh Press Co.*, "[t]he present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the court is asked to speculate as to the effect of publication." 413 U.S. at 390. In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978), the Court upheld an injunction against publication of a canon of ethics in order to restrain unlawful trade practices. In *NLRB* v. *Gissell Packing Co.*, 395 U.S. 575, 616-620 (1969), the Court upheld an order directing an employer to cease and desist from making coercive statements to employees in viola-

[49] ACLU Br. 15-18; RCFP Br. 29-30; AAP Br. 10-14.

[50] As noted by the court of appeals (Pet. App. A20), Lowe would not be enjoined from publishing his views on general commercial or economic matters. Although some interpretive questions may arise with respect to whether certain comments relating to the securities markets constitute "investment advice," it is not unreasonable to require Lowe to take necessary measures to avoid engaging in prohibited activity. See, *e.g.*, *NLRB* v. *Gissell Packing Co.*, 395 U.S. 575, 617, 620 (1969). Indeed, because the court of appeals ordered that Lowe be enjoined only from giving advice with respect to specific securities (Pet. App. A20), he should have no difficulty in determining what sort of conduct is prohibited by the injunction.

tion of Section 8(c) of the National Labor Relations Act. These precedents fully support an injunction against Lowe's publication of unregistered investment advice, as does the Court's approval of an injunction against secondary picketing in *Giboney* v. *Empire Storage Co.*, 336 U.S. at 498, which "did no more than enjoin an offense against [state] law." Again, in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 156 (1951), the Court noted that an injunction may be applied to a newspaper's publication policies to enforce the Sherman Act. So here. Since Congress has properly declared unlawful the rendering of investment advice by those not registered with the Commission, a court may properly enjoin such illegal activity.

C. Petitioners' Investment Advisory Publications Are Entitled To No More Than The First Amendment Protection Afforded Communications Characterized By The Court As Commercial Speech

Although it preferred to analyze this case as involving the regulation of professional or commercial activity, the court of appeals also concluded that regulation of investment advisory publications is proper under the commercial speech doctrine (Pet. App. A17). The two rationales, though in some respects independent, are closely related. Both involve the power of governments to regulate money-making activity. In *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, for example, the Court discussed the regulation of commercial speech in the context of the regulation of commercial activity generally, including activities carried out through speech (436 U.S. at 455-456). See pages 23-25, *supra*. The Court determined that prohibition of in-person solicitation by lawyers "falls within the State's proper sphere of economic and professional regulation" (436 U.S. at 459) not only because of the state's strong interest in protecting the public from professional abuses (*id.* at 460-468), but also because the lawyer's solicitation did not "involve[] political expression or an exercise of associational freedom" (*id.* at 458). Compare *In re Primus*, *supra*.

This rationale applies fully to Lowe's investment advisory publications. Lowe is not seeking to comment on cultural, philosophical, political or religious issues, or to associate with others. Rather, like the solicitation in *Ohralik*, the labor picketing in *NLRB* v. *Retail Store Employees Union*, *supra*, and the corporate proxy statements in *Mills* v. *Electric Auto-Lite*, *supra*, Lowe's speech relates only to private commercial or economic decisionmaking—the advisability of purchasing or selling securities. Moreover, Lowe seeks only to ply his investment advisory trade—to sell his professional advisory services to particular persons who are willing to pay for it. That trade may, as we have demonstrated (see pages 22-39, *supra*), be regulated to protect the public notwithstanding an effect on speech.

1. Communications such as Lowe's, made in the course of regulated commercial activities and not evincing a political or other noncommercial content, should receive no more than the First Amendment protection afforded commercial speech. Lowe's publications share many important characteristics with communications that the Court has recently categorized as commercial speech. We recognize that his advisory publications do not in all respects meet the more narrow definitions that the Court has sometimes used in referring to commercial speech. Nonetheless, we submit that, at least in the special context of the professions, these sorts of communications, intended to influence private economic decisionmaking, may appropriately be considered a variety of commercial speech and regulated accordingly.[51]

The reasons this Court has afforded diminished First Amendment protection to commercial speech apply equally to Lowe's publication of investment advice. Unlike speech of a "cultural, philosophical or political" nature, which is afforded full First Amendment protection because of its

[51] This comports with the flexible approach taken by the Court in *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 6 (classifying as commercial speech informational pamphlets that the Court found could not "be characterized merely as proposals to engage in commercial transactions").

essential role in effective self-government,[52] commercial speech derives its constitutional value solely because of the role it performs in our free enterprise economy where "the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Virginia State Board of Pharmacy*, 425 U.S. at 765. "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system." *Bates* v. *State Bar*, 433 U.S. 350, 364 (1977).

Investment advisory publications serve the same societal purpose as the communications at issue in this Court's commercial speech cases. Rather than providing a forum for philosophical, religious or political discussion, or even for discussion of a general commercial or economic nature (see *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977)), they seek to advise clients on the relative merits of various investments and as such merely recommend commercial transactions. The purpose of investment advice such as that at issue here "is strictly business" (*Friedman* v. *Rogers*, 440 U.S. at 11), and the primary and immediate goal of the advisory publications is to "inform private economic decisions" (*Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)). In short, the advisory letters do no more than tell the reader how to spend his money.[53]

The right to comment on cultural, philosophical, political, and religious issues plays a central role in our system of government and thus has been afforded maximum

[52] *Bates* v. *State Bar*, 433 U.S. 350, 363 (1977); see, *e.g.*, A. Meiklejohn, *Political Freedom* 79 (1960).

[53] Petitioners' publications therefore differ significantly from the types of speech at issue in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978) (lobbying on tax legislation), and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940) (peaceful labor picketing for a legitimate purpose), relied upon by petitioners (Br. 19, 22).

protection under the First Amendment. But, as this Court noted in *Ohralik*, 436 U.S. at 456:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values * * *.[54]

Affording Lowe's publications full protection would result in a devitalization of the First Amendment by eliminating the distinction the Court has carefully preserved between speech relating only to commercial activity and political or ideological speech. Accordingly, Lowe's advisory publications should be entitled to less First Amendment protection than other constitutionally safeguarded forms of expression. *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 4-5; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 562-563 (1980); *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24.

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[54] Petitioners argue (Br. 32-34; see also RCFP Br. 15; AFL-CIO Br. 8-9) that commercial speech is afforded limited First Amendment protection because it is unlikely that advertising is susceptible to being crushed by overbroad regulation and because the advertiser can more readily determine the truth of what is said. See, *e.g.*, *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24; *Bates*, 433 U.S. at 381. But neither point provides a reason for determining that petitioners' publications do not constitute commercial speech. The plethora of investment advisory publications currently being published (see page 36, *supra*) suggests that the medium is sufficiently hardy to withstand the modest registration provisions of the Act. Moreover, the actual truth of Lowe's statements is not at issue. Rather, it is his fitness to practice the profession. In any event, the cited cases deal with one type of commercial speech—product or service advertising. Product knowledge and economic incentive are not the only reason why commercial speech can be regulated. The more important reason is its subordinate position and the fear of devitalization of the First Amendment. These concerns clearly apply to investment advice as well as to advertising.

Petitioners argue (Br. 36) that investment newsletters do not significantly differ from comments on particular products and services in such publications as *Consumer Reports* and *Motor Trends*.[55] This argument, however, ignores the professional context in which investment advice is given and the overriding government interest in regulating that profession.[56] The Court has recognized that com-

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[55] See also ACLU Br. 13; AAP Br. 9. Amicus ACLU argues (Br. 13) that, just as this Court did not treat *Consumer Reports* as commercial speech in *Bose Corp.* v. *Consumers Union*, No. 82-1246 (Apr. 30, 1984), petitioners' publications likewise should not be considered commercial speech. Reliance on *Bose Corp.* is misplaced. *Bose Corp.* addressed only the proper standard of appellate review of an "actual malice" determination where the libel rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), was applied. The Court assumed without deciding that the *New York Times* rule applied for the purposes of deciding the narrow issue before it (see *Bose Corp.*, slip op. 26). The Court noted, however, that the rule "may seem out of place in a case involving a dispute about the sound quality of a loudspeaker." *Id.* at 28; see also *id.* at 1 (Rehnquist, J., dissenting) ("It is ironic in the first place that a constitutional principal which originated * * * because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system"). Thus, the Court did not decide in *Bose Corp.* the proper level of First Amendment protection for *Consumer Reports*.

[56] Thus, even if ordinary consumer-product reports, like investment advisory publications, were commercial speech, they could not constitutionally be subject to regulation similar to that imposed by Congress in the Investment Advisers Act. As this Court has stated, "[t]he [regulatory] interference with speech must be in proportion to the [government] interest served." *In re R.M.J.*, 455 U.S. 191, 203 (1982). The government's interest in the exchange of information about ordinary consumer products and services does not rise to the level of its interest in regulating the exchange of information about securities. Because the intangible nature of securities necessitates greater reliance by investors on the representations of others in judging their value, the trustworthiness of persons recommending the purchase of securities is critical. A further reason why any governmental interest in regulating publishers of ordinary consumer reports differs significantly from the government's interest in regulating advisory publishers is that the investment adviser has a fiduciary relationship

munications made by heavily regulated businesses in the context of commercial transactions are "of less constitutional moment than other forms of speech." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 563 n.5 (1980). This is all the more true where regulation of the professions is involved. See *Friedman* v. *Rogers*, *supra*; *Ohralik* v. *Ohio State Bar Ass'n*, *supra*. Petitioners' "speech," made solely in the context of their conduct within a licensed profession, is surely deserving of no more protection than is commercial speech generally. Otherwise, the power of the government to set professional standards and license admission to the professions could well be subject to First Amendment invalidation.

2. Because professional investment advice should receive no greater protection than is accorded commercial speech generally, the Court should look to its commercial speech cases to determine the highest appropriate level of First Amendment protection in this case. "The Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger* v. *Youngs Drug Products Corp.*, slip op. 4-5. See *Central Hudson Gas & Electric Corp.*, 447 U.S. at 562-563; *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24. The Court's decisions have recognized a "common sense distinction" between commercial speech, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Bolger*, slip op. 4; *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 455-456. Thus, regulation that would not be permissible if applied to fully protected speech may well be proper with respect to commercial speech. For example, the Court has stated on a number of occasions that the

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with his clients. Moreover, even apart from the potential harm to an adviser's own clients, Congress was properly concerned with advisory publications because they "occur in such volume as substantially to affect interstate commerce, national securities exchanges and other securities markets, the national banking system and the national economy." Section 201 of the Act, 15 U.S.C. 80b-1.

presumption against prior restraints may not apply to commercial speech. *Central Hudson*, 447 U.S. at 571 n.13; *Friedman* v. *Rogers*, 440 U.S. at 10; *Virginia State Board of Pharmacy*, 425 U.S. at 771-772 n.24.

Moreover, the Court has recently indicated that "content-based restrictions," which are upheld only in the most "extraordinary circumstances" with respect to noncommercial speech, are "less problematic" when applied to commercial speech. *Bolger*, slip op. 5. See *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 512 (1981); *Friedman* v. *Rogers*, 440 U.S. at 11-16; *Ohralik*, 436 U.S. at 455-456. In fact, whenever this Court has applied a less strict analysis to commercial speech than it would with respect to noncommercial speech, it has engaged in precisely the sort of content-based analysis to which petitioners object (Br. 24-25). Thus, for example, this Court has upheld a prohibition against in-person solicitation of clients by lawyers when engaged in for commercial purposes but protected that activity when engaged in for political or social reasons. Compare *Ohralik* with *In re Primus*, 436 U.S. 412 (1978) (decided the same day). Similarly, the Court afforded less protection to a utility's promotional advertising than to a utility's comments on issues of public interest. Compare *Central Hudson* with *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980) (decided the same day). See also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385-386 (1973). Thus, "'[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.'" *Bolger*, slip op. 8, quoting *Central Hudson*, 447 U.S. at 563.

Government regulation of commercial speech will be upheld so long as it is not more extensive than is necessary to achieve a substantial government interest. *Bolger*, slip op. 9; *Central Hudson*, 447 U.S. at 566. As we have demonstrated (see pages 27-39, *supra*), the ability to bar persons lacking in integrity in financial matters from

engaging in the investment advisory profession is essential to the regulation of that profession.

Petitioners challenge the court of appeals' conclusion that their publications may be enjoined because they are potentially misleading, urging (Br. 37-38) that the government cannot bar speech unless it is found to be actually misleading. By extending limited First Amendment protection to commercial speech, however, this Court has stated that it did not intend to "prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Board of Pharmacy*, 425 U.S. at 772. If the government is deprived of the ability to bar certain types of commercial speech that have a potential for abuse, and must instead demonstrate actual deception in each case, Congress's power to enact prophylactic measures to protect the public from misleading speech would be "substantially diminished." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 466; see also *United States* v. *Readers Digest Ass'n*, 662 F.2d 955 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982).

In *Central Hudson*, the Court emphasized that the test is not whether the speech in question is in fact misleading; it is sufficient that the speech lends itself to such abuse. This is made clear both by the language of *Central Hudson* and by the prior decisions relied on in that case. Thus, the Court stated that "[t]he government may ban forms of communication more *likely* to deceive the public than to inform it." 447 U.S. at 563 (emphasis supplied), citing *Friedman* v. *Rogers*, 440 U.S. at 13, 15-16; *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 464-465; *In re R.M.J.*, 455 U.S. 191, 203 (1982). In *Ohralik* the Court ruled that "[t]he State's perception of the *potential* for harm" justifies banning speech "inherently *conducive* to overreaching and other forms of misconduct." 436 U.S. at 464 (emphasis supplied). The regulation of speech at issue in *Ohralik* prohibited in-person client solicitations by lawyers. The Court dismissed the argument that the state must prove that the lawyer in fact took advantage of his clients, holding that

a state may adopt "prophylactic measures whose objective is the prevention of harm before it occurs." *Ibid.*

Similarly, in *Friedman* v. *Rogers*, *supra*, this Court approved a total ban by Texas on optometrists' use of trade names on the ground that their use was conducive to deception and manipulation, thus leading to a "significant *possibility* that trade names will be used to mislead the public." 440 U.S. at 12-13 (emphasis supplied). The Court found it irrelevant that the use of a trade name was "not in fact misleading," since it was a type of speech "which enhances the opportunity for misleading practices." *Id.* at 15.

The Court in *Friedman* upheld the ban on the use of trade names in part because of its reluctance to second-guess the legislature on the need to ban certain potentially misleading speech (440 U.S. at 13):

> The concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar when * * * it enacted [the ban].

Similarly, there was nothing "speculative" or "hypothetical" about Congress's conclusion that persons guilty of past financial dishonesty are more likely to commit future violations which could lead investors to financial ruin. The Act's regulation of publishers was a result of Congress's concern with "the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors." Senate Report at 21. Further, Congress was aware in 1960 that "increasing opportunities exist for unscrupulous persons to practice as advisers" (see pages 20-21, *supra*), a situation which led to it to strengthen the Commission's authority to deny or revoke the registration of persons guilty of past misconduct. Thus, as was the case in *Friedman*, the record before Congress demonstrating the need for regulating the publication of investment advice by unscrupulous persons was "substantial and well demonstrated." 440 U.S. at 15.

Finally, no constitutional basis exists to support the argument that Congress is limited to imposing disclosure

requirements in regulating the profession. While it is true that "some limited supplementation, by way of warning or disclaimer or the like, might be required * * *" of even truthful speech "to assure that the consumer is not misled" (*Bates*, 433 U.S. at 383-384), this Court in *Friedman* v. *Rogers* emphatically stated that "there is no First Amendment * * * rule" requiring the government to rely upon "publication of additional information [to] clarify or offset the effects" of the potentially misleading speech involved in that case (440 U.S. at 12 n.11). To the contrary, "when experience has prove[n] that [commercial speech] in fact * * * is subject to abuse," this Court has ruled that it may be "prohibited entirely." *In re R.M.J.*, 455 U.S. at 203. As we have demonstrated (pages 36-37, *supra*), disclosure requirements would be wholly inadequate to remedy the evil Congress sought to address in the Act. The Act's registration provisions are no more extensive than necessary to achieve a substantial government interest and therefore must be upheld under the First Amendment.

II. THE STATUTORY EXCLUSION FOR BONA FIDE NEWSPAPERS, MAGAZINES AND FINANCIAL PUBLICATIONS OF GENERAL CIRCULATION DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

The court of appeals correctly rejected petitioners' argument (Br. 39-45), not raised by any amicus, that the Act violates Lowe's right to equal protection under the Fifth Amendment by reason of the exclusion from the definition of investment adviser in Section 202(a)(11)(D) of the Act, 15 U.S.C. 80b-2(a)(11)(D), of any "bona fide newspaper, news magazine or business or financial publication of general and regular circulation" (Pet. App. A15-A16 n.5).[57] As this Court has consistently held:

[57] Petitioners do not now claim to fall within the exclusion. We address Amicus ACLU's statutory argument at pages 17-18 note 17, *supra*.

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. *Dukes*, 427 U.S. 297, 303 (1976). Accord, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). Petitioners' argument that the Act's classification denies them equal protection is insubstantial.

The classifications in the Act do not trammel fundamental rights. Although First Amendment rights are implicated, petitioners' speech, arising out of Lowe's practice of the advisory profession, is plainly subject to government regulation. Compare *Police Dep't* v. *Mosley*, 408 U.S. 92, 99 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). Accordingly, the challenged classification, like any other arising out of the regulation of professional activity, must be considered under the "rational basis" test. See *Friedman* v. *Rogers*, 440 U.S. at 17; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

The governing rule is that "social and economic legislation is valid unless 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational.'" *Hodel* v. *Indiana*, 452 U.S. at 332, quoting *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-84 (1978). This Court "has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 175 (1980). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

The Act's exclusion for bona fide newspapers is fully consistent with and furthers the government's substantial interest in regulating the activities of investment advisory publishers. The exclusion applies to "those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred." *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371, 1377 (2d Cir.), cert. denied, 398 U.S. 958 (1970). The Commission has interpreted the exception to apply only where, "based on the content, advertising material, readership and other relevant factors, a publication is not primarily a vehicle for distributing investment advice." Investment Advisers Act Rel. No. 563, 42 Fed. Reg. 2953 n.1 (1977). See *SEC* v. *Suter*, 732 F.2d 1294, 1297 (7th Cir. 1984). Publications designed primarily to provide investment advice are more likely to be used for fraudulent and abusive practices than those which are not.[58] A classification, such as that embodied in Section 202(a)(11), which is based on the presence of abuses the regulation seeks to eliminate, necessarily advances the government's interest and assures that the regulation will not be more extensive than necessary to serve the interest. While abuses may to some degree arise out of excluded publications, Congress may "address[] itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical Co.*, 348 U.S. at 489.

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[58] The publisher of an ordinary newspaper lacks the same incentives and opportunities to engage in abusive securities practices that are present in the case of advisory publishers. Moreover, editorial control over financial writers provides protections not ordinarily present with respect to advisory publishers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

BRUCE N. KUHLIK
Assistant to the Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ALAN ROSENBLAT
Assistant General Counsel

DAVID A. SIRIGNANO
Assistant General Counsel

GERARD S. CITERA
Attorney
Securities and Exchange Commission

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No. 83-1911

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHRISTOPHER L. LOWE, ET AL.,
Petitioners,

VS.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE

Harry F. Tepker, Jr.
300 Timberdell
Norman, Oklahoma 73019
(405) 325-4699, 325-4832
Counsel for North American Securities Administrators Association, Inc.

Of Counsel:
Joseph C. Long, Special Counsel,
North American Securities
Administrators Association, Inc.
H. Wayne Howell,
Director, Georgia Securities Division,
and President, North American Securities
Administrators Association, Inc.
F. Daniel Bell III,
Deputy Securities Administrator,
North Carolina Securities Division,
and Director, North American Securities
Administrators Association, Inc.

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No. 83-1911

In the
Supreme Court of the United States
OCTOBER TERM, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE

This Brief Amicus Curiae in support of the position of the Respondent is filed with the consent of all parties[1], as provided in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The North American Securities Administrators Association, Inc. (NASAA) is an international organization whose membership includes the securities administrators of the fifty states, the District of Columbia, Puerto Rico, Mexico and the nine Canadian provinces and territories.

1 Letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

The interest of NASAA in the present case arises from the fact that all fifty-three of its American members are charged with the enforcement of the securities laws of the various states. Presently, thirty-six of these state statutes regulate investment advisers. The state statutes work along side and supplement the federal regulatory pattern established by the Investment Adviser Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (1948) ["the Act"]. However, in many respects, the state regulatory scheme is often more stringent than the federal one—as will be outlined in more detail, *infra*.

Most of the state statutory programs are based on the Uniform Securities Act. In turn, this Act, which was drafted in 1957, drew heavily upon the earlier Investment Adviser Act. As a result, the language of both acts is similar or identical in many instances. This is particularly true of the sections which are the focus of the present litigation.

The definition of "investment adviser" found in § 202 (a) (11) of the Act, 15 U.S.C. § 80b-2 (a) (11) (1984) and the registration requirement found in § 203 (a) of the federal Act, 15 U.S.C. § 80b-3 (a) (1984) are also found with only minor changes in the Uniform Securities Act. *See:* Uniform Securities Act, §§ 201 (c) and 401 (f) (1957). Section 408 of the Uniform Securities Act, like § 209 (e) of the federal Act, 15 U.S.C. § 80b-9 (e) (1984), authorizes state administrators to seek injunctive relief against further violations of the state statutes.

Therefore, any one of the thirty-six member states could have brought a similar injunctive action as did the S.E.C. in this instant case.

Because of the nature of their enforcement role and the close similarity of the statutes in the present case and those which NASAA members enforce, the case at bar will have a heavy impact upon the NASAA membership and their continued ability to enforce effectively their state statutes. Therefore, in a very real sense, NASAA and its members have an interest in the outcome of the present litigation.

SUMMARY OF ARGUMENT

The Securities and Exchange Commission (S.E.C.) seeks to enjoin petitioner Christopher L. Lowe and his enterprises "from engaging in the business of advising others, directly or through publications or writings, as to the value of securities or as to . . . investing in, purchasing or selling securities." S.E.C. Complaint [JA23]. The injunction would enforce the S.E.C.'s decision to revoke petitioner Lowe Management Corporation's registration and to bar Lowe from associating with any investment adviser.

The revocation and bar was justified because Lowe's conduct "reflect[ed] a callous disregard" for the principle that "an investment adviser is a fiduciary whose actions must be governed by the highest standards." *In re Lowe Management Corp.*, S.E.C. Investment Adviser Act of 1940 Release No. 759 (May 11, 1981) [JA71]. Specifically, Lowe had been convicted of several serious offenses:

(i) Lowe was convicted of misdemeanors for making false representations to a client that $2,200 had been invested and a 27% return earned, when in fact Lowe had misappropriated the funds for his own use.

(ii) Lowe was also convicted of tampering with physical evidence, a felony. He altered a copy of a $10 money order to make it appear that the order was for $10,000.

(iii) Lowe pleaded guilty to third degree larceny, also a felony, for fraudulently drawing checks on an account to which worthless checks had been deposited.[2]

Lowe did not seek judicial review of the S.E.C.'s order of revocation, which concluded:

> Lowe's various actions clearly demonstrate his total lack of fitness to remain in "an occupation which can cause havoc unless engaged in by those with appropriate background and standards." [*Marketlines, Inc.* v. *S.E.C.*, 384 F.2d 264, 267 (2d Cir.) *cert. denied*, 390 U.S. 947 (1968)] . . . .
>
> Although we recognize the serious effect of the sanctions which [are] imposed, *we are convinced that lesser remedies will not suffice* . . . . In evaluating the public interest requirements in this case, we have taken into account [Lowe's] statement that [he and his enterprises] are now solely engaged in the business of publishing advisory publications . . . . [A]s the law judge noted, even [his] present activities afford numerous "opportunities for dishonesty and self-dealing."

[JA71] [Emphasis added]

The proposed injunction would only enforce the revocation decision. It does not violate this nation's "profound commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York*

---

[2] Since the S.E.C. revocation, Lowe pleaded guilty to two New Jersey charges of theft by deception, for which he was given a three year prison term and probation.

Times v. *Sullivan*, 376 U.S. 254, 270 (1964). The injunction does not remotely threaten interference with a meaningful dialogue of ideas concerning self-government. *Id.* at 269-70. The injunction is not even primarily designed to restrict the flow of truthful information respecting commerce, like bans or restrictions on advertising. *See, e.g., Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas* v. *Public Service Commission*, 447 U.S. 557 (1980). This case is not an appropriate occasion for extraordinary judicial intervention against policies adopted by majoritarian political processes. Despite petitioners' allegations that an injunction would abridge the freedom of the press, the central purposes of the First Amendment are not implicated in this case.

First Amendment cases often require a careful sensitive calculation of what issues are, and what issues are not, at stake. *Cohen* v. *California*, 403 U.S. 15, 18 (1971). This Court must consider, first and foremost, whether expressive freedoms are really endangered in this case—or whether this case involves only a simple application of a general regulatory statute not designed to suppress expressive liberty.

The First Amendment is no absolute and comprehensive guarantee against all forms of government regulation that happen to touch an individual's speech or publication. Consistently, this Court has held that:

> [W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

United States v. *O'Brien*, 391 U.S. 367, 376 (1968). This approach to this type of First Amendment problem is essential, if the government's power to regulate economic and social activity is to be preserved. As stated by the Court in *Konigsburg* v. *State Bar of California*, 366 U.S. 36, 50-51 (1961):

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

The Court accommodates its commitment to enforcing general regulatory statutes with the need to give a careful scrutiny to excessive limits on expressive liberty. Compare *United States* v. *O'Brien*, 391 U.S. at 376-77 with *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980).

In this case, the injunction is not excessive. A careful scrutiny of competing interests should reveal that the proposed injunction merely effectuates the regulation mandated by the Investment Adviser Act of 1940, 15 U.S.C. §§ 80b-1 *et. seq.* ("the Act"). Lesser remedies will not suffice to achieve the purposes of the Act: First, to mandate the highest ethical standards in the investment adviser profession, *and*, second, to ensure that those, like Lowe, who do not live up to their fiduciary duties no longer give any form of investment advice.

ARGUMENT

I

THE PROVISIONS OF THE INVESTMENT ADVISERS ACT AND PARALLEL STATE REGULATION PROMOTE SUBSTANTIAL GOVERNMENTAL INTERESTS NOT RELATED TO SUPPRESSION OF EXPRESSIVE LIBERTY.

A. Federal and state laws are designed to ensure that the investment adviser profession is governed by the highest standards of ethics.

As this Court held in *Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963), the Investment Adviser Act was part of a national effort to regulate the securities industry in order to avoid abuses that contributed to the stock market crash of 1929 and the depression of the 1930's. 375 U.S. at 186.

> A fundamental purpose, common to [federal securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. . . . 'It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry.

Id., at 186, quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963).

The substantial governmental interests underlying the Investment Advisers Act are illustrated by the facts of the *Capital Gains Research Bureau* case. A registered investment adviser purchased securities; then, he recommended them to his clients in a newsletter. Finally, he sold the same securities after the rise in the market price following

his recommendation. This "scalping" violated the canon that investment advisers "should . . . occupy an impartial and disinterested position, as free as humanly possible from the subtle influence of prejudice, conscious or unconscious." 375 U.S. at 188, quoting Investment Trust and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory and Investment Advisory Services, HR Doc. No. 477,76th Cong., 2d Sess. 1, at 66-67.

The decision in *Capital Gains Research Bureau* reflects the purposes of the Investment Adviser Act: First, the motivating "congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship' "; Second, the "congressional intent to eliminate, or at least to expose, all conflicts of interest." 375 U.S. at 191.[3] To promote the

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[3] The case at bar also implicates the interests of the states, who continue to administer parallel regulations respecting investment advisers. Although, most regulation of securities is today the responsibility of the federal government, the substantial state efforts must not be ignored. Indeed, the first securities laws were adopted by the states, beginning in the states had some form of securities act. L. Loss and E. Cowett, *Blue Sky Law*, 3-10, 17-18 (1958). Though these regulations had been ineffective in preventing the events precipitating the Great Depression, the state strategies supplement the federal securities laws. J. Long, *1985 Blue Sky Law Handbook: Developments in State Securities Regulation*, § 1.03.

In recent decades, state regulation of investment advisers has increased. As noted above, presently thirty-six of the fifty-three American state jurisdictions imposed some form of regulation on investment advisers. Most of the state regulatory schemes are based on the Uniform Securities Act. [The significant provisions of this statute dealing with

Act's objectives, Congress enacted a registration requirement and vested investigatory, prosecutorial and regulatory powers in the S.E.C.

B. The power to revoke an adviser's registration is a necessary sanction to protect the investing public. Revocation ensures that those who do not comply with the highest ethical standards are not advisers. Moreover, the prospect of future revocation of registration encourages present compliance by those who are registered.

The functions of the S.E.C.'s powers under § 203(e) of the Act are manifest. The S.E.C. may censure an investment adviser, or it may suspend and revoke his registration if the adviser or any person associated with the adviser has been convicted within ten years of certain felonies or mis-

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[3] (Continued)

investment adviser regulation are reproduced as Appendix A to this brief.] Section 401(f) defines "investment adviser" in virtually the same way as does § 202(a)(11) of the Investment Advisers Act, 15 U.S.C. § 80b-2(a)(11)(1984).

Beyond this, § 102 of the Uniform Act prohibits the giving of fraudulent investment advice, places certain restrictions on investment advisory contracts, and grants the Administrator authority to limit the ability of investment advisers to hold customer funds. Section 201(c) requires the registration of investment advisers, while § 202(b) allows the imposition of a registration fee. Presently, thirty-six states require such registration and impose a fee. 2 H. Sowards & N. Hirsch, *Blue Sky Regulation* § 8.01 (1983)(11C—Part 2 Business Organizations, Matthew Bender). Sections 202(d) and (e) allow the Administrator to impose minimum capital and surety bonding requirements on investment advisers. Fifteen states have exercised this authority and imposed such minimum capital requirements, while thirteen states have adopted bonding requirements. *Id.*, § 8.05[2]. Sections 203(a) and (b) allow the Administrator to impose record-keeping and financial reporting requirements on investment advisers. Fourteen

demeanors. Congress specifically provided for revocation of a registered adviser who has been convicted of (i) any crime that "involves . . . the making of a false report . . . [or] perjury," or (ii) any crime that "involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities." In short, for crimes such as those committed by Lowe, anyone may be—and should be—prevented from continuing business as an investment adviser.

The S.E.C.'s power to stop an investment adviser from continuing business serves at least two functions: First, to protect the public from continuing abuses and crimes by the adviser; *and* second, to provide a sanction that would deter registered advisers from committing these and other violations of law. In short, the Act, like many laws regulating professions, presumes that the prospect of future

[3](Continued)

states have adopted record-keeping requirements, while only thirteen states have imposed financial reporting requirements. *Id.*, §§ 8.07-8.08. Finally, § 204(b)(6) of the Uniform Securities Act allows the Administrator to test investment advisers for professional competence before registering them. Presently, twenty-three states are requiring investment advisers to pass some form of test before registration is granted. Many of the above regulatory features such as minimum capital requirements, bonding and professional competency testing find no counterparts in the Investment Adviser Act.

Finally, § 204(a) sets out grounds for denial, suspension, or revocation of an investment adviser's registration. The more important grounds are: (i) Conviction within the last ten years of any misdemeanor involving a security or any aspect of the securities business or any felony (§ 204(a)(2)(C)); (ii) Having been enjoined by any court from engaging in or continuing any conduct or practice involving any aspect of the securities business (§ 204(a)(2)(D)); (iii) having had

revocation will encourage present compliance. Most important, this second function—that of deterring violations by currently registered advisers—is *independent* of any expectation that an individual whose registration is revoked will repeat acts of misconduct.

The S.E.C. must focus its concern not only on potential abuse and deception in Lowe's future publications. It must also ensure that revocation is real. Lowe apparently wishes to "keep his foot in the door," perpetuating his relationship with past clients—albeit through the medium of a newsletter. Despite the clear purpose of revocation—to stop the business of a wrongdoer—Lowe preserves "the good will" of his on-going business concern as a investment adviser. In effect, if not deliberately, he circumvents the decision to revoke his license by transforming his business—at least in name—from investment adviser to "publisher."

[3](Continued)

his registration revoked by the S.E.C. or any state securities agency; or (iv) having engaged in dishonest or unethical practices in the securities business (§ 204(a)(2)(G)).

NASAA is presently attempting to implement this last extremely important ground for disciplinary action by the adoption of a professional standard of conduct for investment advisers. *See:* NASAA, Proposed Statement of Policy, "Unethical Business Practices for Investment Advisory Firms," 1 Blue Sky L. Rep. (CCH) ¶ 5343 (1983) [Appendix B to this Brief.] When completed, this Statement of Policy will be recommended to the NASAA member states for their adoption on an individual state-by-state basis.

It should be apparent that any of the thirty-six state jurisdictions could have revoked or denied Petitioner's registration based upon Lowe's conviction for numerous felonies and misdemeanors involving the securities business, as well as the S.E.C.'s revocation of registration and the injunction in the present action.

A statute—and many similar regulations of professions—can constitutionally impose a sanction, a punishment, a legally defined consequence for specified violations of law. The Fifth and Amendments explicitly specify that an individual *can* be deprived of life, liberty *and* property with due process of law. A member of a regulated profession can be prevented from continuing business in that profession after proof of wrongdoing.

II

THE CONSTITUTIONALLY-JUSTIFIED SUSPICION OF PRIOR RESTRAINTS AGAINST EXPRESSIVE ACTIVITY DOES NOT EXTEND TO ALL FORMS OF INJUNCTIVE RELIEF THAT TOUCH ON SPEECH OR EXPRESSION AS AN INCIDENTAL PART OF OTHERWISE UNLAWFUL CONDUCT.

The First Amendment does not ban all injunctions that involve expressive activity by requiring that they be labeled "prior restraints." As the cases discussed *infra* illustrate, courts may enjoin a pattern of conduct violating a general regulatory statute not designed to suppress expressive activity. This is so even though the enjoined conduct may involve expressive activity and an injunction might, therefore, be caricatured as "prior restraint" or "censorship."

> The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. [There is a] duty of closer analysis and critical judgment in applying the thought behind the phrase . . . "What is needed," writes Professor Paul A. Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis." The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539.

Kingsley Books, Inc. v. *Brown*, 354 U.S. 436 (1957).

Again, this Court must remember what is not at issue in this case. Fundamental principles of constitutional law prohibiting censorship are not at stake. There is no question that suspicion of prior restraints is the first principle of the First Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931); L.W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (1960). Prior restraints involve special dangers: They can "stifle the immediacy of speech." A.M. Bickel, *The Morality of Consent* 61 (1975). This Court should not adopt a vague and uncertain balancing test to replace its customary and justified suspicion of true censorship.

Nevertheless, this Court must look to see if the government seeks to stifle expressive activity, or if the government merely seeks to enjoin illegal conduct involving some expression. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *pire Storage Co.*, 336 U.S. 490, 498 (1949).

Cases involving some of the most important federal regulatory programs illustrate these principles. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), this Court held that no antitrust liability can be premised on legitimate efforts to petition government. The *Noerr-Pennington* doctrine was designed to ensure that federal courts did not punish activities which

were, first, "essentially dissimilar" from activities "traditionally condemned" by the Sherman Act, and, second, an exercise of political freedoms. *Noerr Motor Freight*, 365 U.S. at 136-37.

However, the Court also stated that it would not tolerate wrongdoing camouflaged as political activity. "There may be situations in which a publicity campaign ostensibly directed toward influencing governmental action is a mere sham to cover what is nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Id.* at 144.

This limiting principle was given effect in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Plaintiffs had sought injunctive and compensatory relief against an alleged scheme to abuse government processes in order to interfere directly with competition. According to the complaint, the defendants had tried to deny competitors "meaningful access to adjudicatory tribunals" by initiating baseless claims and proceedings. In a unanimous decision holding that the plaintiffs had stated a cause of action under the Sherman Act, the Court used strong language reminiscent of *Giboney*:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute . . . First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' . . . which the legislature has the power to control. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful.

California Motor Transport, 404 U.S. at 514-15.

A historic case from the labor relations field illustrates the propriety of an injunction that has incidental effects on expressive activity. In *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), the Supreme Court held that federal courts could enjoin unions and union officials from leading strikes over arbitrable disputes, when such strikes violated a no-strike covenant in a collective bargaining agreement. A union's vulnerability to a *Boys Markets* injunction and other relief often turns on the union's responsibility for so-called "wildcat" strikes. *Cf., United States* v. *International Union, Mine Workers of America*, 77 F. Supp. 563 (D.C. 1948) ("nods," "winks," and "codes" as evidence of union leadership); *Carbon Fuel* v. *Mine Workers*, 586 F.2d 1346 (4th Cir. 1978), *aff'd.* 444 U.S. 212 (1979). Moreover, it requires little imagination to see that the efficacy of a *Boys Markets* injunction depends, in part, on "stifl[ing] the immediacy" of union leaders' expressions of support for an illegal strike—whether the leaders' expressions are "personal," "impersonal," in public union meetings, in newsletters, on radio and television or by way of "nods," "winks," and "codes." In such cases, federal injunctions promote the basic objectives of the National Labor Relations Act: Encouraging collective bargaining by enforcing arbitration agreements and no-strike pledges. *Boys Markets* v. *Retail Clerks Union*, 398 U.S. at 247-49. These are good reasons that the violators of these so-called prior restraints ought to be assured of being held in contempt for disregarding the injunctions.

Finally, injunctions can serve governmental interests in the fight against race or gender discrimination. In *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S.

376 (1973), this Court upheld a local order prohibiting a newspaper from listing job advertisements in sex-designated help-wanted columns. The order enforced a local ordinance against employment discrimination. Addressing the issues posed by injunctions in such cases, Professor Alexander Bickel noted:

> Neither is the right to publish absolute; nothing is . . . Newspapers have, for example, been enjoined, under the Civil Rights Act of 1968, from printing advertisements for the sale of real estate to whites only; here governmental action is exerted to attain the government's objective not only by action against the seller, but by pursuit of the publisher. The publisher is said to have a commercial interest in such cases, but he always has, and political opinion is not irrelevant to publication of racially discriminatory advertisements
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> . . .

A.M. Bickel, *The Morality of Consent* 86 (1975). In such cases, the government pursues its substantial interest in eliminating the "men only" or "whites only" signs of employers or property owners—not because it wishes to censor, silence or stifle debate—but because it wishes to enforce equal opportunity in the marketplace. It does so, first by restrictions on what a seller or employer may include in its "offer" for a contract of sale or employment. It also supplements this regulation by saying that the seller and employer cannot advertise what they cannot do. Still, all this is "prior restraint," but not the type that the First Amendment prohibits.

III

THE ACT'S EXEMPTION FOR "BONA FIDE NEWSPAPERS OR FINANCIAL PUBLICATIONS" DOES NOT DEPRIVE THE PETITIONERS OF EQUAL PROTECTION OF THE LAWS.

The principle that all are entitled to the equal protection of the laws directs only that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920), quoted in *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). However, neither the Fifth Amendment nor the Fourteenth Amendment "require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940), also quoted in *Plyler*, 457 U.S. at 216 [Emphasis added]. On the federal level, "the initial discretion to determine what is 'different' and what is 'the same' resides" in Congress, which

> must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on [government's] practical ability to remedy every ill.

Id. at 216 (addressing equal protection principles applied to the states).

In this context, Lowe's challenge to the Act's classification scheme—which exempts banks, lawyers, and others, as well as bona fide newspapers and publications—is reminiscent of *Morey* v. *Doud*, 354 U.S. 457 (1957). In that case, Illinois had expressly exempted American Express from the operation of stringent financial requirements for firms

engaged in the money order business. In *Morey*, the Supreme Court struck down this exemption in Illinois' exclusively economic regulation as irrational. However, the case was overruled expressly in *New Orleans* v. *Duke*, 427 U.S. 297 (1976), which reaffirmed the initial discretion of political institutions to distinguish what is "the same" and what is "different." Even though Lowe plainly relies on the presence of First Amendment issues to challenge the Act's classifications in this case, the implications of the petitioners' analysis leads to the odd and inflexible notion that Congress could exempt banks, lawyers, accountants, engineers and others, but it cannot distinguish between bona fide newspapers not primarily engaged in investment advice from other publications whose raison d'etre is investment advice.

An alternative possibility is that Congress can establish no classifications because of the presence of these First Amendment issues. However, this does not appear to be Lowe's point. Instead, petitioners disregard the lessons of many recent cases which have refused to create a First Amendment privilege against the operation of general regulatory statutes. Indeed, the petitioners argue for just such a privilege so that the Act's classifications might be revised just enough to immunize Lowe's continuing investment advice business.

A. The task of classifying between investment advisers within the scope of the Act and bona fide publications is a factual inquiry. This Court should not declare the Act's classification to be unconstitutional merely because of an unwarranted lack of confidence in the S.E.C.'s capacity for assessing facts.

Congress limited the scope of the duty to register (as opposed to the anti-fraud provisions of securities laws) by exempting certain entities not primarily engaged in the business of giving investment advice—such as banks and lawyers. Congress also sought to reduce tension between its regulatory scheme and First Amendment values by recognizing that the registration provisions should not apply to another class of institutions, who also are not engaged primarily in the investment advice business—bona fide newspapers and financial publications.

In *S.E.C.* v. *Wall Street Transcript*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), the court of appeals approved the essence of the S.E.C.'s factual approach to distinguishing between investment advisers and bona fide newspapers and financial publications.

> Section 202(a)(11) of the Act list a number of examples of persons or entities whose activities might fall within the broad definition of 'investment adviser' but *whose customary practices would not place them in the special, otherwise unregulated, fiduciary role for which the law established standards* . . . The phrase "bona fide" newspapers, *in the context of this list*, means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred. The determination of whether or not a given publication fits

> within this exclusion must depend on *the nature of its practices* rather than upon the purely formal 'indicia' of a newspaper . . .

422 F.2d at 1376-77 [Emphasis added]. *See, also, e.g.: S.E.C.* v. *Suter,* 732 F.2d 1294 (7th Cir. 1984); *S.E.C.* v. *Wall Street Publishing Institute, Inc.,* 591 F.Supp. 1070 (D.D.C. 1984) (application of "nature of practices" test to defendant's Stock Market Magazine); "Applicability of Investment Advisers Act to Certain Publications," 42 Fed. Reg. 2953 (1977), 17 C.F.R. § 276.

The primary test established by these cases is the publication's raison d'etre: Is the publication designed primarily for the giving of investment advice, or is the scope of the publication's reason for being different, broader or only incidentally related to matters that might be categorized as "investment advice?" This test can only be formulated in general terms—and it is necessarily factual in character. It is not free from difficulty, as Judge Brieant, dissenting in the Court of Appeals, pointed out. *S.E.C.* v. *Lowe,* 725 F.2d 892, 908 (2d Cir. 1984). However, many laws, statutes and regulations involve difficult factual issues.

When a publication is, arguably, a mere pretext for the operation of a continuing investment advice business, proof of the "publisher's" subjective motive or intent should be considered, along with objective evidence of the nature of the publication's activity. *S.E.C.* v. *Wall Street Transcript Corp.,* 422 F.2d at 1377-78. The nature of the "publisher's" activity would be pertinent to the assessment of the publication's reason for being. *See also, e.g., S.E.C.* v. *Wall Street Publishing Institute, Inc.,* 591 F.Supp. 1070, 1077-81 (D.D.C. 1984).

Only by focusing on the nature of the practices to be regulated—investment advice—and carefully sifting all available evidence to consider the primary purpose and nature of the activity, can an agency or court effectively accommodate the competing regulatory and constitutional interests.

B. The petitioners' suggested classification scheme—distinguishing between "personal" and "impersonal" advice—is no easier to administer than the S.E.C.'s test based on the nature of the alleged adviser's practices.

The factual and administrative difficulties of applying statutory classifications are not avoided by changing the focus of the Act from (i) the differences among publications to (ii) a distinction between "impersonal" and "personal" advice. Moreover, the latter test is not the classification of Congress.

First, the difficulties inherent in the "personal-impersonal" standard are evidenced by the rulings of the District Court . *S.E.C.* v. *Lowe,* 556 F.Supp. 1359 (S.D.N.Y. 1983). "Publication" is impersonal—and therefore beyond the scope of the Act as interpreted by Judge Weinstein. *Id.* at 1365. A tape recorded "hot-line" in which a call is initiated by a subscriber is "personal," although the adviser makes no "tailor-made" recommendations. *Id.* at 1371.

Consider a third possibility—"broadcast": an investment adviser whose registration has been revoked secures a position as host on a radio talk show. He specializes in the discussion of the stock market and the American economy. The adviser advertises his show in his newsletter. The adviser listens to and answers questions by his many

listeners, who include—of course—his clientele. Is this protected First Amendment activity that is "impersonal?" Or is this unprotected investment advice that is "personal" because it "creates dangers of personal advice?" 556 F.Supp. at 1371. (Suppose the adviser also delivers a stirring rendition of selections from Areopagitica? *S.E.C.* v. *Lowe*, 725 F.2d at 908 [Brieant, J., dissenting]) The distinction between "personal" advice and "impersonal" advice is not irrelevant. However, neither the petitioners, their amici, nor the District Court demonstrate why the "personal"-"impersonal" formulation should be the exclusive test. As these examples suggest, it is no guide to determining when First Amendment interests are paramount or absent. And contrary to the petitioner's apparent suggestions, the "personal"-"impersonal" test is no index to when a relationship of trust and confidence exists—and might be subject to abuse, as the *Capital Gains Research Bureau* decision amply demonstrates.

The S.E.C. and the courts cannot find a true escape from assessing all facts and circumstances—unless the Court takes a drastic step proposed by no one, yet, and holds that the giving of investment advice privately or publicly, personally or impersonally, is protected activity under the First Amendment. A careful assessment of Lowe's logic shows that future litigants in future cases may allege that giving investment advice is beyond government's power to enjoin —no matter what medium is utilized to deliver the message. *Cf., Greenmoss Builders, Inc.* v. *Dun & Bradstreet, Inc.*, 461 A.2d 414 (Vt. 1983), *cert. granted*, ... U.S. ....., 104 S.Ct. 389 (1983).

C. The logic of the petitioner's equal protection argument leads to excessively broad constitutional privileges for alleged press enterprises from general regulatory statutes.

The press enjoys no special immunity from the operation of general regulatory statutes. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967). This has been the consistent lesson of numerous decisions of this Court. Businesses which happen to be engaged in expressive activity are not immune from antitrust laws, *Associated Press* v. *United States*, 326 U.S. 1 (1945), or the labor relations statutes, *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1945). Journalists lack special privileges of access to correctional facilities. *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post*, 417 U.S. 817 (1974); *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). Journalists with information relevant to criminal investigations may not resist a subpoena of a grand jury on the ground of some generalized newsman's privilege. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Newspapers are subject to ordinary searches under a valid warrant. *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). These and other familiar decisions demonstrate the "clear message [that] attempts to find a special protection for the institutional press within the Speech and Press Clauses of the First Amendment will not succeed." M. A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 Sup. Ct. Rev. 225 (1978).

Despite this clear message, Lowe's logic is that all individuals purporting to exercise First Amendment rights enjoy an expansive privilege against general regulations. Indeed, in *Branzsburg*, this Court has foreseen exactly this

problem of distinguishing who is entitled to the protections of a generalized First Amendment privilege, if such an immunity were to be recognized.

> Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that the liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher whose utilizes the latest photocomposition methods.

408 U.S. at 703.

It is one thing to suggest that the federal government may voluntarily restrain the exercise of its regulatory power to reduce tension between regulatory interests and First Amendment values by trying to distinguish between those engaged in bona fide expressive activity and those engaged in the business of investment advice. It is quite another matter to require—as a matter of constitutional law—that all individuals purporting to exercise their First Amendment rights have a special privilege against general regulatory statutes. Yet it is the broader *constitutionally*-based privilege that petitioners urge in the instant case.

To recognize the petitioners' expansive claims of privilege against the operation of federal and state securities regulation "would present practical and conceptual difficulties of a high order," *Branzburg*, 408 U.S. at 703, including the risk of gravely undermining the government's capacity to achieve its intended and substantial interest in "control-[ling] advisers and . . . prevent[ing] those who are not registered from giving investment advice." *S.E.C.* v. *Lowe*, 556 F.Supp. 1359, 1363 (S.D.N.Y. 1983).

IV

THE FEDERAL AND STATE GOVERNMENTS HAVE SUBSTANTIAL INTERESTS IN PRESERVING THE FREEDOM TO EXPERIMENT IN THE DEVELOPMENT OF DIFFERENT REGULATORY STRATEGIES AGAINST UNFAIR TRADE PRACTICES.

The persistent problems of unethical investment advice and other forms of securities fraud confront government with the familiar, but difficult task of dealing with unfair trade practices. After decades of effort, it is conventional wisdom that unfair or fraudulent business practices run the gamut of human ingenuity and chicanery. As a result, federal and state strategies must grow, evolve, and adapt to new schemes. To this end, federal and state officials have proposed a new policy statement for defining the high fiduciary duties to be imposed on investment advisers. NASAA, Proposed Statement of Policy, "Unethical Business Practices for Investment Advisory Firms," 1 Blue Sky L. Rep. (CCH), ¶ 5343 (1983) [set forth in Appendix B to this brief].

First Amendment doctrine should not be stretched to restrict state and federal capacity for regulating unfair trade practices. In this context, the famous observations of Justice Brandeis in his famous dissenting opinion in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 310-12 (1932) are pertinent to this case. Speaking about the application of "substantive due process" doctrine to state economic regulation in the Great Depression, Brandeis argued that he could not believe that the framers of the Fourteenth Amendment intended to deprive the states of the power to correct the abuses and evils of commerce:

There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . .

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . . But in the exercise of this high power, we must be ever on guard, lest we erect our prejudices into legal principles.

This Court must not lose sight of the overriding fact that this case involves a traditional form of economic regulation—not political censorship. The concept of freedom of expression has little or nothing to do with the business of giving investment advice. Expressive liberty is essential for self-government in a democratic republic. However, it should not be used as camouflage for reinjecting into our Constitution the doctrines of laissez faire as restrictions on the legislative powers of the nation and the states.

> [I]n the world of political advocacy and its marketplace of ideas, there is no such thing as a 'fraudulent idea.' [The] free flow of information is important in this context not because it will lead to any objective "truth," but because it is essential to our system of self-government. The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available on request, reciting the Latin maxim 'caveat emptor.' . . . [I]n a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

Central Hudson Gas v. *Public Service Commission*, 447 U.S. 557, 598-99 (1980) (Rehnquist, J., dissenting).[4]

CONCLUSION

This case cannot be resolved by resort to mechanical tests or talismanic labels like "prior restraint" or "strict scrutiny." As in all cases involving the application of general regulatory statutes designed for purposes unrelated to censorship or suppression of free expression, judicial analyis must accommodate the public interest in preserving the legislatures' capacity to govern.

As Professor Bickel once noted, the First Amendment is "a series of compromises and accommodations." A.M. Bickel, *The Morality of Consent* 57 (1975). The application of general regulatory statutes to those who claim to be only expressing themselves is a particularly difficult occasion for precise rules and coherent theory. However, one basic principle in this "untidy accommodation" is that the press, and those who claim the benefits of the First Amendment, enjoy no special immunity from the laws generally applicable to everyone else. In this sense, the case at bar boils down to whether or not Mr. Lowe can continue to advise

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[4] Indeed, the petitioners' preference for court-ordered disclosure of Lowe's convictions to be published in the newsletters seems like "merely a statement . . . reciting . . . 'caveat emptor.' " *Id.*

the public on the value of securities merely because his current strategy and last resort for perpetuating his business is publication of newsletters.

Respectfully submitted,

Harry F. Tepker, Jr.
300 Timberdell
Norman, Oklahoma 73019
(405) 325-4699, 325-4832

Counsel for North American Securities Administrators Association, Inc., Amicus Curiae

Of Counsel:

Joseph C. Long, Special Counsel,
North American Securities
Administrators Association, Inc.

H. Wayne Howell,
Director, Georgia Securities Division,
and President, North American Securities
Administrators Association, Inc.

F. Daniel Bell III,
Deputy Securities Administrator,
North Carolina Securities Division,
and Director, North American Securities
Administrators Association, Inc.

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APPENDIX A

Pertinent Provisions of the Uniform Securies Act

SECTION 401(f). "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include (1) a bank, savings institution, or trust company, (2) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession; (3) a broker-dealer whose performance of these services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation for them; (4) a publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation; (5) a person whose advice, analyses, or reports relate only to securities exempted by section 402(a)(1); (6) a person who has no place of business in this state if (A) his only clients in this state are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (B) during any period of twelve consecutive months he does not direct business communications into this state in any manner to more than five clients other than those specified in clause (A), whether or not he or any of the persons to whom the communications are directed is then present in this state; or (7) such other persons not within the intent of this paragraph as the [Administrator] may by rule or order designate.

SECTION 201(c). It is unlawful for any person to transact business in this state as an investment adviser unless (1) he is so registered under this act, (2) he is registered as a broker-dealer without the imposition of a condition under section 204(b)(5), or (3) his only clients in this state are investment companies as defined in the Investment Company Act of 1940 or insurance companies.

SECTION 204(a). The [Administrator] may by order deny, suspend, or revoke any registration if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser.

(A) has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(B) has willfully violated or willfully failed to comply with any provision of this act or a predecessor act or any rule or order under this act or a predecessor act;

(C) has been convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;

(D) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;

(E) is the subject of an order of the [Administrator] denying, suspending, or revoking registration as a broker-dealer, agent, or investment adviser;

(F) is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, agent, or investment adviser, or the substantial equivalent of those terms as defined in this act, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States Post Office fraud order; but (i) the [Administrator] may not institute a revocation or suspension proceeding under clause (F) more than one year from the date of the order relied on, and (ii) he may not enter an order under clause (F) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section;

(G) has engaged in dishonest or unethical practices in the securities business;

(H) is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the [Administrator] may not enter an order against a broker-dealer or investment adviser under this clause without a finding of insolvency as to the broker-dealer or investment adviser; or

(I) is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b).

The [Administrator] may by order deny, suspend, or revoke any registration if he finds (1) that the order is in the public interest and (2) that the applicant or registrant

(J) has failed reasonably to supervise his agents if he is a broker-dealer or his employees if he is an investment adviser; or

(K) has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The [Administrator] may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next thirty days.

SECTION 408. Whenever it appears to the [Administrator] that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this act or any rule or order hereunder, he may in his discretion bring an action in the [insert name of appropriate court] to enjoin the acts or practices and to enforce compliance with this act or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the [Administrator] to post a bond.

APPENDIX B

Proposed Statement of Policy

UNETHICAL BUSINESS PRACTICES FOR INVESTMENT ADVISORY FIRMS

Public Comment Draft

North American Securities Administrators Association, Inc. The following are "unethical practices" by an investment adviser:

1. Recommending to a client the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser.

2. Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without first obtaining written discretionary authority from the client unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

3. Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources and character of the account.

4. Placing an order to purchase or sell a security for the account of a client without authority to do so.

5. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained written third party trading authorization from the client.

6. Borrowing money or securities from, or lending money or securities to, an investment advisory client.

7. Representing itself as a financial or investment planner, consultant, or adviser, when the representation does not accurately also disclose the nature of the services offered, the qualifications of the person offering the services, and the method of compensation for the services.

8. Use [Using] in substantially the same form advisory material prepared by other persons without identifying the name of the author or publisher of such material.

9. Charging a client an unreasonable advisory fee.

10. Failing to disclose compensation arrangements in connection with advisory services to clients which are in addition to compensation from such clients for such services.

11. Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the firm and its employees which could reasonably be expected to impair the rendering of unbiased and objective advice.

12. Guaranteeing a client against loss in connection with advice which will be rendered.

13. Failing to maintain adequate safekeeping facilities for customer funds and securities.

14. Publishing, circulating, or distributing any advertisement which:

A. contains any untrue statement of a material fact, or which is otherwise false or misleading; or

B. refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

C. refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person; provided, however, that this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (1) state the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price of each such security as of the most recent practicable date, and (2) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body of text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

D. represents, directly or indirectly, that any graph, chart, formula, or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his or her own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

E. contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis, or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly.

For the purposes of this rule the term "advertisement" shall include any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any

security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to who should buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

15. Disclosing the identity, affairs, or investments of any client unless required by law to do so.

16. Charging a client both an advisory fee for rendering investment advice and a commission for executing securities transactions pursuant to such advice without disclosing in writing to the client full details regarding the conflict of interest that exists in acting in both capacities.

17. Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds, unless:

A. all such securities of each such client are segregated marked to identify the particular client who has the beneficial interest therein, and held in safekeeping in a place reasonably free from risk of destruction or other loss; and

B. all such funds of such clients are deposited in one or more bank accounts which contain only clients' funds; such account or accounts are maintained in the name of the investment adviser as agent or trustee for such clients; and the investment adviser maintains a separate record for each such account which shows the name and address of the bank where such account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interest in such account; and

C. such investment adviser, immediately after accepting custody or possession of such funds or securities from any client, notifies such client in writing of the place and

manner in which such funds and securities will be maintained, [and] thereafter, if and when there is any change in the place or manner in which such funds or securities are being maintained, gives each such client written notice thereof; and

D. such investment adviser sends to each client, not less frequently than once every three months, an itemized statement showing the funds and securities in the custody or possession of the investment adviser at the end of such period, and all debits, credits and transactions in such client's account during such period; and

E. all such funds and securities of clients are verified by actual examination at least once during each calendar year by an independent public accountant at a time which shall be chosen by such accountant without prior notice to the investment adviser. A certificate of such accountant stating that he or she has made an examination of such funds and securities, and describing the nature and extent of such examination, shall be filed with the Commissioner promptly after each such examination.

The conduct set forth above is not inclusive. Engaging in other conduct such as non-disclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice.

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No. 83-1911 (10)

IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

MICHAEL E. SCHOEMAN
SCHOEMAN, MARSH, UPDIKE & WELT
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Counsel for Petitioners

Of Counsel:
MICHAEL P. RICHMAN

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REPLY BRIEF OF PETITIONERS

ARGUMENT

I.

Licensing of Petitioners' Publishing Activities Cannot Be Premised on the Power to License Professions.

The Commission's argument rests on the erroneous premise that the legislative power to create and regulate professions as to any particular subject matter implies a

power to regulate and license those who merely write about and publish on that subject matter (see, e.g., Comm. Br. 10, 22-39, and 43-44). The error is that the legislature is prohibited by the First Amendment from determining what topics may be the subject of public discussion or who may be the speakers, *see, e.g., First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), and cases cited at Pet. Br. 22-25. Congress cannot avoid that prohibition through the device of creating professions and then extending those professions to include writers and publishers.

The power to license professionals extends only to persons who render personal services or advice and cannot, under the First Amendment, include persons who merely publish. The power of the legislature to license, for example, persons who render personal psychological advice does not mean that the state can require a license of anyone who writes a book about human psychology or a magazine article on how to feel better. To take another example, one might suppose that Congress determined, not unreasonably, that billions of dollars in the United States are lost due to reliance of government, industry, securities traders, and other private people on faulty economic advice which in some cases was found to be fraudulent, and that therefore Congress created the licensed profession of "economic advisers." Petitioners readily acknowledge that persons rendering personal economic advice could be licensed, but it is inconceivable that Congress, by virtue of its power to regulate this profession, would then have the power to require Milton Friedman or Paul Samuelson—or Christopher Lowe—to be licensed as a precondition of publishing books, magazine articles or newsletters containing economic information, analysis and opinion.*

The power to regulate professions does not give the state power to regulate writings published about the subject matter of the profession. A person must be licensed to act as a lawyer, doctor or plumber. But he is free to publish a book on how to avoid probate or whether to take vitamin C for the common cold, or how to fix a leaking faucet, without the prior restraint of a license. If, as the Commission's brief argues, a legislature can use the power to regulate professions as a means of licensing those who merely publish, then virtually every subject matter and every publisher is potentially subject to licensing in the discretion of the legislature.** The First Amendment's protection afforded the press against government licensing, *see, e.g., Lovell* v. *Griffin,* 303 U.S. 444, 451-52 (1938), would disappear.

---

* *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), cited at Comm. Br. 26 for the proposition that there is no First Amendment right to practice a particular profession, suggests a further example. Roth was an assistant professor teaching political science, 408 U.S. at 566, and, as such, is concededly subject to professional licensing. But the state's power to license Roth could not possibly permit the state to license the publication of books—or newsletters—about political science.

** Although the Commission argues that by virtue of the newspaper exemption, the Court need not decide whether newspapers and news magazines could constitutionally be licensed if they publish investment advice (Comm. Br. 36 n. 46), nevertheless the Commission's "professionalization" argument would clearly extend Congressional licensing power over all publications choosing to publish such material. If Congress's power to professionalize a subject implies Congressional power to license those who write about that subject, then notwithstanding the First Amendment, newspapers and news magazines as well as newsletters and books can be licensed, subject only to whatever distinctions among publishers Congress might decide to make.

The distinction between the rendition of personal advice or services and constitutionally protected publication is based on the difference between private individualized communication for compensation and public discussion. The professional, for compensation, renders a service to particular individuals with respect to their particular problems. His activity is of limited significance to the public at large. But the person who publishes his opinions contributes directly to the great marketplace of ideas, whether those ideas involve political science, gardening, astrology or investments or any other subject in which the public is or may be interested.* The personal adviser addressing the particular problems of particular clients, gains trust and confidence by virtue of the personal relation he has with his clients. An impersonal publisher, however, competing with hundreds or thousands of other voices in the public arena, gains his readership's loyalty, if any, by the ability of his ideas to withstand the rigors of the marketplace of ideas.**

The Commission therefore errs when it claims that Christopher Lowe's position is no different than that of a

* That publications may be sold for a profit does not remove them from First Amendment protection. *E.g., Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-02 (1952).

** The distinction between personal advice and impersonal publishing does not rest on the numbers of clients or readers (see Comm. Br. 35). One's right to First Amendment protection is not determined by the popularity or persuasiveness of the views and opinions he expresses. Correspondingly, a person rendering personal advice may not escape the force of regulation by being so successful or so vigorous in his activity as to have a large number of clients. *The distinction is whether the speaker is tailoring his advice to the particular concerns and needs of his particular clients, or whether he is publishing facts and opinions to the world at large, without regard to the particular situation of particular readers.*

lawyer, doctor or other professional who continues to practice notwithstanding revocation of his license (Comm. Br. 23). Of course Lowe could not continue to render personal investment advisory services. But by virtue of his First Amendment rights, Lowe is entitled to participate in public discussion of ideas and matters of public interest. He is free to publish impersonally his opinions about securities, just as a disbarred lawyer, or even a nonlawyer, *see, e.g., New York County Lawyers' Association* v. *Dacey*, 21 N.Y.2d 694, 287 N.Y.S. 2d 422 (1967), is free to publish his views, advice and opinions about legal matters.*

The Commission repeatedly argues that Congress intended to regulate newsletter publishers under the Act (*E.g.*, Comm. Br. 10, 12, 15-17, 32-33). But it is constitutionally irrelevant whether Congress intended that investment newsletter publishers be deemed "investment advisers" or that they be subject to fiduciary standards. The concern here is not the *intent* of Congress but whether Congress has the *power* under the First Amendment to subject to licensing those who merely impersonally publish their views and opinions about a matter of legitimate public interest. Such publishing activities constitute pure First Amendment speech. Since Congress has no power to determine who may and who may not speak, Congress has no power to subject publishers to the licensing requirements of the Act, regardless of whether Congress intended to categorize the publishers as investment advisers, fiduci-

* The regulatable distribution of advice by members of the bar to clients based on recent developments without tailoring the advice to clients' individual needs (see Comm. Br. 34 n. 44) is incidental to the rendering of personal services to those clients. But case law is clear that a person not rendering or offering to render personal legal services who distributes advice based on developments in a particular legal area cannot be deemed to be practicing law, *e.g.*, *Dacey*.

aries or anything else, *cf. NAACP* v. *Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels").

Thus the Commission's heavy reliance on *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) (Comm. Br. 13, 14, 15, 16, 17, 18, 19, 20 and 32) is misplaced. The issue there was only the interpretation of the statute based on Congressional intent. Without consideration of First Amendment issues, the Court in *Capital Gains* found that Congress intended that publishers of investment advice be investment advisers and that they be governed by fiduciary standards under the Act. Petitioners do not argue that proposition.* The question now raised is not one of statutory interpretation and congressional intent, but one of Congressional power under the First Amendment, a question not reached in *Capital Gains*.

Similarly, the Commission's quotations from *Savage* v. *CFTC*, 548 F.2d 192 (7th Cir. 1977) (Comm. Br. 30, 31) merely reflect an interpretation of Congressional intent. That intent is not relevant in deciding whether the Act's licensing scheme violates the constitutional protection for pure First Amendment speech.**

* Whether Congress created, or recognized, investment advisers as "professionals" is less clear than the Commission argues. One essential characteristic of a professional has traditionally been "a certain degree of skill and learning upon which the community may confidently rely. . . ." *Dent* v. *West Virginia*, 129 U.S. 114, 122 1889). The Act, however, has no requirement of skill, learning or other indication of expertise.

** *Savage* denied review of the CFTC's order refusing to register Savage as a "commodity trading advisor [sic]." Savage published his commodity newsletter in connection with his activities as a commodity trader and advisor, and had personal contact with clients, 548 F.2d at 194, and the court assumed that Savage's newsletter was commercial speech, *id.* at 197. The court did not suggest that the newsletter should be so characterized, or that its publication could be enjoined, if publishing had been Savage's only activity.

It must be added that although Congress included publishers within the definition of investment adviser, the legislative record was inadequate to explain Congress's action under the First Amendment. Petitioners agree with the Commission that the Act was a product of the Commission's study of the investment company and investment trust industries (see Comm. Br. 14). But the Commission fails to note that that study "was intended to exclude any person or organization which was engaged in the business of furnishing investment analysis, opinion or advice solely through publications distributed to a list of subscribers, and did not furnish specific advice to any client with respect to any securities, ..." H.R. Doc. No. 477, 76th Cong., 2d Sess. 1 (1940). Moreover, the more than one thousand pages of legislative hearings, including testimony from leading investment advisers apparently intending to eliminate "fringe" elements of the profession*—reveal no abuses by any publishers of newsletters. The "dangerous potentialities" referred to in the memorandum that the Commission submitted to Congress (Comm. Br. 15 n. 14) were no more than vague generalizations. And that memorandum** forcefully argued the constitutional impermissibility of the Act's scheme for licensing publishers.

Contrary to the Commission's contention (Comm. Br. 33-34), petitioners' argument does not require the invalidation of a wide variety of licensing schemes. The only invalidation that petitioners seek is the invalidation of

* *See Hearings on Investment Trusts and Investment Companies, S.3580, Subcommittee of the Senate Committee on Bankruptcy and Currency*, 76th Cong., 3d Sess. 756-57, 743 (1940); *see also* H.R. Doc. No. 477, 76th Cong., 2d Sess. 27-28 (1940).

** The memorandum is quoted extensively at pp. 6-9 of the brief of amicus American Civil Liberties Union.

Congress's attempt to license and thereby restrain persons engaged solely in the constitutionally protected activity of publishing. Petitioners do not seek to invalidate any licensing or other regulation with respect to persons rendering personal investment advice or any other kind of personal advice or service.

The traditional personal-impersonal distinction between professionals and publishers is not difficult to apply, as the brief of amicus North American Securities Administrators Association, Inc. ("NASAA") contends (NASAA Br. 21-22). Advice to individual clients based on their own situations is personal. Advice to the public through the medium of a newsletter is impersonal.*

Moreover, the argument of NASAA on this issue is particularly puzzling. Despite the NASAA brief's concern for state blue sky regulation of newsletter publishers and its challenge to the personal-impersonal distinction, NASAA has strongly supported excluding newsletter publishers, and all other impersonal publishers, from investment adviser regulation under the Uniform Securities Act on the ground that their advice is general and remedies other than licensing are available to punish misconduct.*

* The hypotheticals posed by NASAA, *id.*, are readily resolved. Tape recorded messages not tailored to particular callers' problems are impersonal. Although Judge Weinstein in the district court disagreed (Pet. App. A67), his view was questioned by the court of appeals majority (Pet. App. A8). As for the talk show host who (presumably for compensation) answers specific questions from listeners, he is engaged *both* in personal activity, because he is giving specific advice directly to specific listeners, and in impersonal publication of his views, because he is disseminating them to the public at large. Whether the speaker could be regulated depends on a determination of whether the personal advice is a subordinate component of the speaker's activities. Since the speaker could convey the same opinion and information using hypothetical examples, petitioners suggest that the First Amendment would not be infringed if the speaker, to the extent he gave specific personal advice for compensation, were subject to regulation.

Ultimately, the Commission's professionalization argument is no more than a claim that Congress has discretion and power to select particular subject matters as to which the Government can determine who may speak to the public and who may not.** But the First Amendment disqualifies

* On October 14, 1981 NASAA adopted proposed amendments to the Uniform Securities Act ("U.S.A."), 1 Blue Sky L. Rep. (CCH) 1502). Among these is the following amendment expanding the newspaper exclusion contained in the definition of "investment adviser" in U.S.A. § 401(f), *id.* at ¶ 5541, to exclude newsletters:

> In Sec. 401(f), substitute for (4) through (7) as follows:
>
> "(4) a publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of rendering of advice on the basis of the specific investment situation of each client; or other financial institutions or institutional buyers, whether acting for themselves or as trustees; . . . ."

1 Blue Sky L. Rep. (CCH) ¶ 5541.05. The reasons stated by NASAA for the proposed change are as follows:

> The exclusion [in section 401(f)(4)] pertaining to securities advisory publishers is expanded to include newsletter publishers who do not give advice to subscribers on the subscriber's specific investment situation. Because of the general nature of publishers services, and the fact that the anti-fraud provisions apply to publishers even if excluded, the exclusion was expanded.

Id.

** Except for its "professionalization" argument, the Commission does not claim that the Act's licensing standards comply with constitutional restrictions on prior restraint of pure First Amendment speech. However the Commission, erroneously, dismisses as in-

(footnote continued on next page)

Congress from prohibiting speech on any particular subject matter or from choosing who may be the speakers. *See, e.g., Carey* v. *Brown*, 447 U.S. 455, 462 (1980); *First National Bank of Boston* v. *Bellotti, supra.* The "professionalization" of publishers provided by the Act is simply the licensing of the press prohibited by the First Amendment.

II.

Licensing of Petitioners' Publishing Activities Cannot Be Premised on the Argument That the Act Is a General Regulatory Statute or that the Act Only Incidentally Touches on Speech.

As applied to publishers, the registration provisions of the Act are not a general regulatory statute as the Commission argues (see Comm. Br. 35, 39). They are not like a ban on secondary picketing or an antitrust law (see Comm. Br. 24). They do not apply to all businesses or even to all publications. The registration provisions are specifically directed at control of speech and constitute content-based regulation applied selectively to two classes. One is personal investment advisers, whom Congress can

substantial, petitioners' argument that the Act vests the Commission with an impermissible degree of discretion (Comm. Br. 22 n. 30). The Commission's discretion under the Act no more "provides additional protection to those in petitioners' position", *id.*, than does the discretion given to a police commissioner to permit First Amendment activity that a local ordinance otherwise prohibits. Whether or not the public interest standard satisfies restrictions on delegation of legislative authority or requirements of due process, discretion to license the press limited only by the public interest standard is not sufficiently precise, or sufficiently tailored to legitimate state concerns, to withstand First Amendment scrutiny.

indeed license. The second is publishers impersonally publishing investment information and opinion, who are fully protected by the First Amendment's prohibition on prior restraint.

Nor can the registration provisions of the Act be sustained on the ground, urged by amicus NASAA (NASAA Br. 12-16) that they are not related to petitioners' expressive liberty and that they do no more than "touch on" speech as an incidential part of otherwise unlawful conduct. Petitioners are engaged in no activity other than publishing. Apart from the registration requirements of the Act, petitioners are not engaged in any conduct claimed to be unlawful.* Requiring a license of petitioners solely because they publish a certain type of information and opinion is directly related to petitioners' expressive liberty, and a statute prohibiting them from publishing doesn't merely "touch on" speech: it squashes speech.

III.

Licensing of Petitioners' Publishing Activities Cannot Be Premised on Commercial Speech Doctrine.

The Commission concedes that petitioners' publications do not meet what the Commission calls "the more narrow definitions" that the Court has "sometimes" used in referring to commercial speech (Comm. Br. 40). Indeed the

* Amicus NASAA also erroneously suggests (NASAA Br. 11) that petitioners' publishing is a mere subterfuge for the continuation of their personal advisory business. The record, however, is devoid of any indication that subsequent to the Commission's order of May 1981 any petitioner has rendered or offered to render any personal investment advice to any client or potential client.

Commission does not show that petitioners' publications fit within any definition that the Court has ever used in referring to commercial speech.

Petitioners' publications do not serve the same societal purpose as commercial speech, as the Commission argues (Comm. Br. 41). A disinterested publisher's speech about commercial transactions is not the same as a seller's speech that proposes that the reader purchase the seller's wares or services. Commercial speech is regulated not because it relates to commercial transactions, but because it is advertising. Advertising is part of the speaker's effort to sell his own product and may be regulated as a subordinate part of his sales activity, particularly because the advertiser has extensive knowledge of his own products and therefore can maintain the truthfulness of his speech, and because advertising, by virtue of the speaker's interest in making the sale, is a hardy form of expression. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 n. 6 (1980).

In apparent recognition that petitioners' publications do not fall within the Court's commercial speech definitions and analysis, the Commission ultimately falls back on the predominating argument of its brief, the assertion that petitioners are professionals (Comm. Br. 43 n. 56). But calling petitioners "professionals" by virtue of the Act merely begs the question, since the issue is not what Congress decided to call this type of publisher, or what restrictions Congress intended to impose on them, but whether Congress has the constitutional power to license them.

Because the Commission ultimately relies on Congressional intent to validate Congressional power, the Commission's brief is unable to distinguish, on First Amendment grounds, commentary in such publications as *Consumer Reports* and *Motor Trend* from commentary in petitioners' publications (see Comm. Br. 43). The Commission's view that the government has a higher interest in the exchange of information about securities than about ordinary consumer products (Comm. Br. 43 n. 56) may or may not be correct. One may suppose that the Commission's view is not shared by the Consumer Product Safety Commission or the Federal Trade Commission. In any event, the extent or relative weight of any supposed government interests in regulating one type of consumer product as distinct from another is not significant. Whether or not Congress is more concerned with securities than with children's sleepwear or automobile safety, the First Amendment requires protection from the prior restraint of licensing for impersonal publications regarding matters in which the public has or may have a legitimate interest.

Moreover, even under a commercial speech analysis, the Commission fails to show that petitioners' newsletters can be totally suppressed. The Commission does not argue that there is any misrepresentation or deception in those publications (see Comm. Br. 42 n. 54). Nothing in petitioners' publications is shown to be inherently conducive to over-reaching or to other forms of misconduct, and no showing is made of any likelihood that those publications will deceive the public more than they will inform the public (see Comm. Br. 46). Nor does *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (Comm. Br. 47) permit a total ban on petitioners' publications even if they are assumed, *arguendo*,

to be commercial speech. *Friedman* approved a ban on the use of trade names, but the Court carefully noted that the ban did not, and could not, extend to the informational aspect of optometrists' advertising such as information about the price and nature of the services offered, 440 U.S. at 16. Even if petitioners' newsletters were analyzed as though they were mere advertising, they would be entitled to the full protection afforded commercial speech because they concern lawful activity and are not misleading. *See Central Hudson Gas,* 447 U.S. at 566. In light of the multiplicity of post-publication remedies available if misconduct were to occur,* the remedy of total prohibition of future publication of newsletters never found to have been misleading would be grossly disproportionate to the effectuation of any proper government interest, and therefore cannot be sustained.

IV.

The Court Should Invalidate the Registration Provisions of the Act As Applied to Publishers.

If the Court concludes that, as applied to publishers, the registration provisions of the Act are unconstitutional, petitioners ask that the Court invalidate the registration provisions as so applied. The Court should not merely invalidate the revocation and bar provisions and uphold the requirement that publishers nevertheless register, as the Commission suggests (Comm. Br. 25 n. 31). To do so

* The Commission, at Comm. Br. 36, citing Pet. Br. 37-38, misstates petitioners' position on the remedy of disclosure of Lowe's past misconduct. Petitioners only contended that where *advertising* has been found to be misleading, disclosure in future advertising has been found to be a proper remedy.

would be implicitly to decide an important and difficult constitutional question that is not necessary to a disposition of this case and that is not adequately presented by the record. That question is whether Congress may enact an automatic disclosure-oriented registration requirement as applied to publishers. Such cases as *Talley* v. *California,* 362 U.S. 60 (1960) and *Thomas* v. *Collins,* 323 U.S. 516 (1945), and the strong aversion of the Founders to any form of press licensing, *see Lovell* v. *Griffin,* 303 U.S. at 451-52, strongly suggest that the validity of such a requirement would be far from clear. To decide the question would require an examination, in light of the heavy presumption against *any* system of prior restraint, of the government's interest, the need for such a provision, the adequacy of alternatives, the effect of the particular elements of disclosure required, and the impact of such registration on the exercise of First Amendment activity.

Congress did not consider those factors nor was the validity of such a registration requirement litigated below. The act that Congress considered and adopted, and that petitioners were charged with violating, imposes a different licensing scheme, one involving discretionary licensing and past misconduct as a ground for denial or revocation. Since there is nothing in the legislative record to show that Congress considered an automatic disclosure-oriented registration requirement, the Court should not rewrite the Act to create one. If the Act as applied to publishers is unconstitutional, it is for Congress to decide whether to adopt a new narrowly drafted enactment. If such a new registration requirement is enacted, the courts will then be able to examine that statute on an appropriate legislative record and an appropriate litigated record.

Conclusion

For the foregoing reasons and those set forth in the Brief of Petitioners, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

MICHAEL E. SCHOEMAN
SCHOEMAN, MARSH, UPDIKE & WELT
60 East 42nd Street
New York, New York 10165
(212) 661-5030
Counsel for Petitioners

Of Counsel:
MICHAEL P. RICHMAN